

# African Americans “Are Not Carbon Copies” of White Americans<sup>1</sup>— The Role of African American Culture in Mediation of Family Disputes

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*Urcelle, 43, and Eugene Brown, 45, an African American couple, have been married for fifteen years. During the marriage, two children were born. Presently, Marcus, the youngest child, is four years old. His sister, Chanika LaShaun, is fourteen years old. For two years, Urcelle and Eugene's relationship has been deteriorating. After concerted efforts to reconcile personal differences, Urcelle filed a petition for a divorce.<sup>3</sup>*

## I. INTRODUCTION

Generally, dispositions of divorces follow similar procedures adhered to in other civil matters. A petitioner or complainant commences a divorce by filing a complaint. Then the respondent defends herself against the complainant's allegations. Frequently, a party claims that her spouse engaged in some kind of marital misconduct or that they simply could not reconcile their differences. In jurisdictions where fault-based divorces may be filed, common allegations for divorce include mental or physical cruelty and adultery.<sup>4</sup> Additionally, divorces may encompass a myriad of other

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<sup>1</sup> Dr. Wade W. Nobles, African Psychology: Towards Its Reclamation, Reascension and Revitalization, Address before the Center of Black Culture, West Virginia University, Morgantown, W. Va. (Oct. 17, 1995).

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<sup>3</sup> Throughout this Article, I refer to members of the Brown family. Eugene and Urcelle Brown have two children—Chanika LeShaun and Marcus. Mrs. Annie Mae Walker, the children's maternal grandmother, appears later in the Article. I created this family to illustrate how African American family members may react to certain stimuli during mediation sessions. This is a fictitious family that is not intended to represent any actual family or family member whom I have known.

<sup>4</sup> See Judge Nigel Fricker, *Family Law is Different*, 33 FAM. & CONCILIATION

issues such as a child's well-being and upbringing, financial support for a spouse or a child, property distribution and protection against violence.<sup>5</sup>

In the American judicial system, mediation of family disputes has become an increasingly popular option.<sup>6</sup> To settle family arguments, the court, in its discretion, may order parties to participate in mediation.<sup>7</sup> In other states, legislatures have mandated that parties submit to some form of alternative dispute resolution to attempt to resolve certain domestic quarrels.<sup>8</sup> In most instances, however, the process is voluntary.<sup>9</sup> Based

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CTS. REV. 403, 408 (1995); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1584 (1991) (stating that many women file for divorce due to domestic violence).

<sup>5</sup> See Fricker, *supra* note 4, at 404.

<sup>6</sup> See JOHN M. HAYNES, *THE FUNDAMENTALS OF FAMILY MEDIATION* 1 (1994); Steven H. Hobbs, *Facilitative Ethics in Divorce Mediation: A Law and Process Approach*, 22 U. RICH. L. REV. 325, 326 (1988) (calling mediation a "vital part of family legal problem solving"); Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 702 (1994) (indicating that the use of mediation in the state of Florida is "increasing rapidly"); see also Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1363-1364 (referring to the use of mediation to resolve domestic disputes).

<sup>7</sup> See, e.g., FLA. STAT. ANN. § 44.102(2)(b) (West Supp. 1998) (allowing for the submission of custody, visitation and "other parental responsibility issues to mediation"); ME. REV. STAT. ANN. tit. 19-A, § 251(1) (West Supp. 1997); NEV. REV. STAT. ANN. § 3.500 (Michie Supp. 1997) (establishing a custody and visitation mediation program); N.C. GEN. STAT. § 50-13.1(b) (1995); OR. REV. STAT. § 107.765(1) (Supp. 1996) (ordering mediation of custody and visitation issues); VA. CODE ANN. § 8.01-576.5 (Michie Supp. 1996).

<sup>8</sup> The following statutes make mediation of some family issues mandatory: CAL. FAM. CODE § 3170 (West 1994) (making mediation of child custody and visitation disputes mandatory); ME. REV. STAT. ANN. tit. 19-A, § 251(2) (West Supp. 1997) (mandating referral of cases involving minor children to mediation).

<sup>9</sup> In several states, divorce mediation is allowed, but not required. See ALA. CODE § 6-6-20(3) (Supp. 1997); ALASKA STAT. § 25.24.080 (Michie 1996) (allowing the court to order child custody mediation); CAL. FAM. CODE § 1814(b)(8) (West 1994); COLO. REV. STAT. § 14-10-129.5 (1997) (permitting the court to require mediation of disputes regarding parenting time); CONN. GEN. STAT. § 46b-53a (1995) (allowing for mediation of divorce, property, financial, child custody and visitation issues); FLA. STAT. ANN. § 61.183 (West 1997) (permitting visitation, custody and primary residence issues to be referred to a mediator); 750 ILL. COMP. STAT. ANN. 51/607.1(c)(4) (West 1993 & Supp. 1997) (allowing courts to order mediation in visitation disputes); IOWA CODE ANN. § 598.41(2)(d) (West Supp. 1997) (giving the court the option of requiring mediation of joint custody matters); KAN. STAT. ANN.

upon those statutes, if parties choose the process, a variety of family issues are ripe for mediation. Such issues include child support,<sup>10</sup> child custody<sup>11</sup> and visitation.<sup>12</sup>

Mediation has been promoted as one of the best means of resolving marital disputes, especially when children are involved. In this article, I critique this informal process and implore mediators to be more sensitive to ramifications of the participants' races and cultures. Part II explains how the mediation process may unfold in domestic relations cases and describes the advantages of this alternative to the litigation method of solving disagreements.

Parts III through VI specifically explain how culture and race may affect mediation. For example, some customs in African American culture distinguish African American families from white American families.<sup>13</sup>

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§ 23-602 (1995); ME. REV. STAT. ANN. tit. 19-A, § 251(1) (West Supp. 1997) (giving the court the discretion to refer any domestic relations matter to mediation); MICH. COMP. LAWS ANN. § 552.513 (West Supp. 1997); MINN. STAT. § 518.619 (1997); N.M. STAT. ANN. § 40-12-5 (Michie 1994); N.D. CENT. CODE § 14-09.1-01 (1997); OHIO REV. CODE ANN. § 3109.052 (Banks-Baldwin 1995); R.I. GEN. LAWS § 15-5-29 (1996); WASH. REV. CODE § 26.09.015 (1997) (permitting mediation on family issues); Grillo, *supra* note 4, at 1583 (indicating that there are too many dangers in the mediation process for it to be mandatory); *see also* Carter v. Carter, 470 S.E.2d 193, 202-203, 204 (W. Va. 1996).

<sup>10</sup> *See, e.g.*, VA. CODE ANN. § 8.01-576.9 (Michie Supp. 1997).

<sup>11</sup> *See, e.g.*, ALASKA STAT. § 25.20.080 (Michie 1996) (allowing courts to stay proceedings and order mediation); CAL. FAM. CODE § 3185 (West 1994) (allowing the courts to set a hearing on unresolved issues).

<sup>12</sup> *See* CAL. FAM. CODE § 1814(b)(8) (West 1994) (authorizing a supervising counselor in family conciliation court to mediate child custody and visitation disputes).

On the other hand, several states do not require disputants to participate in mediation when there is evidence of domestic violence. *See* COLO. REV. STAT. § 13-22-311(1) (1997) (excluding cases involving psychological or physical abuse); FLA. STAT. ANN. § 44.102(2)(b) (West Supp. 1998) (excluding cases involving domestic violence that may compromise efforts to reach a fair settlement); HAW. REV. STAT. § 580-41.5 (Supp. 1996); *see also* LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 16:19, at 34-35 (1996) (suggesting that domestic violence and other cases involving abuse and violence be excluded from mediation because it is difficult to equalize power); FORREST S. MOSTEN, THE COMPLETE GUIDE TO MEDIATION 35 (1997) (setting an agenda for comprehensive mediation).

<sup>13</sup> Many incorrect stereotypes are published about African Americans. This Article is not intended to represent mannerisms, economic status and family values for all African Americans. *See* ANDREW HACKER, TWO NATIONS 67 (1992) ("[T]here is no generic black family."); Johnnie McFadden, *Stylistic Counseling of the Black Family*,

After describing differences between African American and white American culture and family values, I conclude that white mediators should be cognizant of and more sensitive to those differences as they mediate family matters. To provide suggestions for mediators who want to develop and exercise cultural sensitivity, I rely upon social scientists' recommendations for effective family therapy sessions with African Americans. Mediators can and should use the same or similar strategies in resolution of family disputes.

## II. MEDIATION PROCEDURE

Mediation is a process through which an impartial and neutral third person called a mediator encourages and assists disputants to negotiate a settlement of their conflicts.<sup>14</sup> Usually, mediation is consensual and parties choose to solve problems with a private mediator's assistance.<sup>15</sup> Alternatively, a court may issue a sua sponte order that the disputants mediate certain issues in court annexed mediation.<sup>16</sup>

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in BLACK MARRIAGE AND FAMILY THERAPY 210, 210 (Constance E. Obudho ed., 1983) ("[T]o group black families under a single description is to deny them their varying abilities to adapt to an array of economic, social, and political institutions."). See generally Jualynne Dodson, *Conceptualizations of Black Families*, in BLACK FAMILIES 77, 77-87 (Harriette Pipes McAdoo ed., 2d ed. 1988) (dispelling some of the negative and incorrect information about African American families); Laurie L. Wilson & Sandra M. Stith, *Culturally Sensitive Therapy with Black Clients*, in COUNSELING AMERICAN MINORITIES: A CROSS-CULTURAL PERSPECTIVE 101, 109 (Donald R. Atkinson et al. eds., 4th ed. 1993) (cautioning therapists to fashion remedies for each African American family by taking into consideration each family's unique qualities) [hereinafter COUNSELING AMERICAN MINORITIES]. On the other hand, several studies show that there are some cultural practices, "trends, and tendencies" that are prevalent among large segments of the African American population. HACKER, *supra*, at 68. Those are discussed in this Article.

<sup>14</sup> See DIANE NEUMANN, CHOOSING A DIVORCE MEDIATOR 121 (1996); see also VA. CODE ANN. § 8.01-576.9 (Michie 1995) (noting that the mediator "has an obligation to remain impartial and free from conflicts of interest"); MOSTEN, *supra* note 12, at 17-18 (defining mediation); Tom Arnold, *Mediation Outline—A Practical How-To Guide for Mediators and Attorneys*, C976 ALI-ABA 579, 588 (Dec. 15, 1994).

<sup>15</sup> See Moberly, *supra* note 6, at 708, 711; see also ELROD, *supra* note 12, § 16:16, at 29-32 (providing a sample mediation agreement). See generally NEUMANN, *supra* note 14.

<sup>16</sup> See MOSTEN, *supra* note 12, at 29 (mentioning other means of instituting mediation such as by agreement of counsel or a third party seeking mediation on behalf

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A private divorce mediator may be a lawyer, a psychologist, a social worker, a family therapist or a counselor who has certified mediation training.<sup>17</sup> During mediation sessions, the mediator's role is to assist the parties to identify and prioritize issues, identify resolutions and point out areas of agreement. On the other hand, she is prohibited from coercing the parties to reach a settlement.<sup>18</sup>

At a prearranged time, the parties and the mediator meet for one or more sessions.<sup>19</sup> Statutes and guidelines have been designed to provide

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of the parties; also describing mediation that is court-annexed or by court referral); *see also* VA. CODE ANN. § 8.01-576.6 (Michie Supp. 1995) (allowing a party to object to mediation referral, without cause, within 14 days of the court's referral); Moberly, *supra* note 6, at 706, 707 (allowing the party or a judge to select the mediator); Committee on Continuing Legal Education of the Virginia Law Foundation, Evidentiary Issues in Domestic Relations Cases, I-4 to I-6 (1993) (explaining mediation procedures followed in the state of Virginia). *But see* Grillo, *supra* note 4, at 1582 (indicating that most participants will not choose mediation because they do not know what it is).

<sup>17</sup> *See* CAL. FAM. CODE § 3164 (West 1994) (mandating that a mediator have a master's degree in a behavioral science and two years of counseling or psychotherapist training); N.C. GEN. STAT. § 7A-494(c) (1995) (requiring 40 hours of mediation training and a master's degree in psychology, social work and counseling or human relations); HAYNES, *supra* note 6, at x; MOSTEN, *supra* note 12, at 129-160 (referring to the mediation cases of therapists, consultants, lawyers and clergy persons); Roger R. Wong, *Divorce Mediation Among Asian Americans: Bargaining in the Shadow of Diversity*, 33 FAM. CONCILIATION & CTS. REV. 110, 121 (1995) (indicating that most mediators are lawyers or mental health professionals); *see also* ALASKA STAT. § 25.20.080(a) (Michie 1996) (permitting parties to challenge one appointed mediator); Grillo, *supra* note 4, at 1585 (indicating that choosing mediators is left to the courts in most instances).

<sup>18</sup> *See* AMERICAN ARBITRATION ASSOCIATION MODEL STANDARDS OF CONDUCT FOR MEDIATORS § I (1996) (mandating that the parties reach an uncoerced agreement); NEUMANN, *supra* note 14, at 126 (mandating assisting the parties without coercing them to reach an agreement); *see also* VA. CODE ANN. § 8.01-576.9 (Michie Supp. 1997) (indicating that the mediator may not coerce the parties); *In re Marriage of Ames*, 360 S.W.2d 590, 591-592 (Tex. Ct. App. 1993); MOSTEN, *supra* note 12, at 25 (listing the different roles of a mediator); Diane Fornari, *Expanding Horizons for Domestic Litigation in West Virginia*, W. VA. LAW., March 1997, at 12; Hobbs, *supra* note 6, at 350 (forbidding coercion and the making of substantive decisions for participants); Moberly, *supra* note 6, at 709; *cf.* Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177, 211 (1994) (arguing that "to fulfill the promise of greater efficiency mediators will pressure both lawyers and parties to reach agreements quickly").

<sup>19</sup> *See, e.g.*, ALASKA STAT. § 25.20.080(b) (Michie 1996). Also, both parties must

some structure for mediation. However, to a large extent, the process varies widely. Because mediation procedure is so flexible, sessions are tailored to meet the needs of individual disputants.

In many instances, though, the mediator's first meeting with the disputants is an orientation session. During this initial conference, the mediator educates the parties about the rules of mediation and the mediator's expectations.<sup>20</sup> Also, the mediator may use this preliminary meeting to ascertain whether the parties are appropriate candidates for mediation and whether their issues are ones that can be mediated.<sup>21</sup>

Again, the manner in which the disputants actually resolve their conflicts will vary. Typically, however, during mediation sessions, one participant identifies an issue and states her position on that issue. Then the adverse party responds.<sup>22</sup> During these discussions, the mediator supervises the exchange of information and negotiations by helping the parties to redefine their respective issues and positions and bargain realistically.<sup>23</sup> Sometimes, although it is a rare occurrence, parties may offer relevant

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consent to further sessions. *See, e.g.*, VA. CODE ANN. § 8.01-576.6 (Michie Supp. 1997); Carlisle Dickson, *Divorce Mediation*, in *DIVORCE MEDIATION* 28, 35-52 (Carlisle Dickson & Cindra Carson eds., 1983) (explaining the process).

<sup>20</sup> *See* ELROD, *supra* note 12, § 16:06, at 11-12 (explaining the mediation process); MOSTEN, *supra* note 12, at 31; Dickson, *supra* note 19, at 35-38; Hobbs, *supra* note 6, at 354; Moberly, *supra* note 6, at 708 (describing the mediation process in Florida).

<sup>21</sup> *See* Carter, 470 S.E.2d at 202 (describing the most frequently used model of mediation).

<sup>22</sup> *See* MOSTEN, *supra* note 12, at 35-36 (setting forth the format for some mediation sessions).

Disputants usually employ their own lawyers. However, in some states, lawyers are not allowed to participate in the mediation sessions. *See* CAL. FAM. CODE § 3182 (West 1994) (giving the mediator authority to bar attorneys from sessions); KAN. STAT. ANN. § 23-603(a)(6) (1995); WIS. STAT. ANN. § 767.11(10) (West 1993) (allowing counsel and guardians ad litem to appear); Grillo, *supra* note 4, at 1597 (forbidding lawyer participation in California unless the parties reach an agreement); Loretta W. Moore, *Lawyer Mediators: Meeting the Ethical Challenges*, 30 FAM. L.Q. 679, 716-717 (1997). *But see* MOSTEN, *supra* note 12, at 30 (indicating that attorneys participate in 50% of his mediations); Dickson, *supra* note 19, at 44 (declaring that lawyers should never be excluded).

<sup>23</sup> *See* ELROD, *supra* note 12, § 16:07, at 14 (emphasizing that the mediator's role involves assisting the parties to reach an agreement, not to decide issues); Dickson, *supra* note 19, at 42-43 (encouraging the mediator to engage in "reality testing" by asking certain questions during a caucus).

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evidence and witnesses on an informal basis.<sup>24</sup>

Although it is not a favored method of mediating family matters, some mediators conduct private caucuses.<sup>25</sup> Mediators use caucuses to confer with each party separately. Caucusing helps the mediator determine settling points and clarify issues. Also, caucusing is a tool for giving parties who are angry or afraid to stay in the same room with an adverse party an opportunity to separate.<sup>26</sup>

Subsequent to a private meeting or caucus, the mediator may reconvene a joint session to attempt to steer the parties toward settlement.<sup>27</sup> At that point, the parties may further refine issues and discuss alternatives for solving them.<sup>28</sup> Other sessions (there may be several) may be scheduled until some or all issues subject to mediation are resolved or the parties agree that they have reached an impasse.<sup>29</sup>

Still, most cases settle if the participants are able to communicate effectively and respectfully.<sup>30</sup> When divorcing parties resolve their disagreements, the mediator may prepare a written agreement and encourage the parties to seek independent legal advice before they finalize the settlement.<sup>31</sup> The ultimate agreement will be nonbinding, however,

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<sup>24</sup> See Dickson, *supra* note 19, at 40–43.

<sup>25</sup> See ELROD, *supra* note 12, § 16:06, at 12; MOSTEN, *supra* note 12, at 25 (listing caucuses as optional); NEUMANN, *supra* note 14, at 122, 125 (referencing separate meetings and individual caucuses); Dickson, *supra* note 19, at 37, 45–46, 50; Grillo, *supra* note 4, at 1589 (stating that this is a frequent occurrence); Wong, *supra* note 17, at 123, 125–126 (encouraging careful use of separate sessions for emotionally estranged couples and stalemates). *But see* NEUMANN, *supra* note 14, at 83 (preferring mediation with both parties in the same room); Arnold, *supra* note 14, at 591 (indicating that family mediators use this method of mediation less than those who mediate commercial disputes).

<sup>26</sup> See ELROD, *supra* note 12, § 16:06, at 12 (stating reasons for choosing to have private caucuses).

<sup>27</sup> See Dickson, *supra* note 19, at 49–50 (identifying areas of agreement).

<sup>28</sup> See ELROD, *supra* note 12, § 16:06, at 12–13.

<sup>29</sup> See MOSTEN, *supra* note 12, at 37–38.

<sup>30</sup> See Arnold, *supra* note 14, at 615.

<sup>31</sup> See Carter, 470 S.E.2d at 202; HAYNES, *supra* note 6, at 187–188; MOSTEN, *supra* note 12, at 39 (choosing whether the mediator or a lawyer will write the agreement); NEUMANN, *supra* note 14, at 126; *see also* ELROD, *supra* note 12, § 16:08, at 15–17 (suggesting that a lawyer counsel the parties before they participate in mediation and review preliminary agreements if the mediator prepares the agreement); Dickson, *supra* note 19, at 50–52 (giving advice on drafting agreements). *But see*

unless the parties agree to be bound.<sup>32</sup> When the couple does execute a covenant, it eventually is incorporated into a court order. As such, it has the binding effect and enforceability of any other valid contract.<sup>33</sup> On the other hand, if the participants are unable to resolve their differences, the matter shall proceed through the regular adversarial process.<sup>34</sup>

Mediation proceedings are shrouded with confidentiality. During private caucuses, a party or her representative may share confidential information with the mediator that the party is unwilling to communicate to her adversary.<sup>35</sup> Without permission, the mediator may not disclose that information. In addition, excluding a few exceptions, neither the mediator nor the parties may divulge information about events that transpired at any time during mediation. Not only is this protection enforced during mediation, but also disclosure is forbidden after mediation is terminated.<sup>36</sup>

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Moberly, *supra* note 6, at 716-717 (not obligating mediators in Florida to write the agreement).

<sup>32</sup> See Fricker, *supra* note 4, at 410 (citing Nigel Fricker & Janet Walker, *Alternative Dispute Resolution—State Responsibility or Second Best?*, 29 CIV. JUST. Q. 34 (1994)). *But see* VA. CODE ANN. § 8.01-576.12 (Michie Supp. 1997) (allowing the agreement to be vacated if the neutral fails to inform the parties that the mediator does not provide legal advice and that each party has a right to seek independent advice of counsel or there has been a failure to provide full disclosure during a dispute regarding financial matters).

<sup>33</sup> See VA. CODE ANN. § 8.01-576.11 (Michie Supp. 1997); *In re Marriage of Ames*, 560 S.W.2d at 591-592 (binding husband's property settlement reached in mediation); Dickson, *supra* note 19, at 51.

<sup>34</sup> See, e.g., ALASKA STAT. § 25.20.080(c) (Michie 1996).

<sup>35</sup> See Arnold, *supra* note 14, at 612-613; *see also* HAYNES, *supra* note 6, at 60-61 (noting the usefulness of caucusing).

<sup>36</sup> See ARK. CODE ANN. §§ 4351.5, 4607 (Michie 1997); CAL. FAM. CODE § 3177 (West 1994); FLA. STAT. ANN. § 61.183(3) (West 1997); KAN. STAT. ANN. § 23-606 (1995); MICH. COMP. LAWS ANN. § 552.513(3) (West Supp. 1997); MINN. STAT. ANN. § 518.619(5) (West 1997); *Bernard v. Galen Group, Inc.*, 901 F. Supp. 778, 783-784 (S.D.N.Y. 1995) (fining an attorney \$2500 for disclosing confidential information about settlement offers made during mediation); AMERICAN ARBITRATION ASSOCIATION MODEL STANDARDS OF CONDUCT FOR MEDIATORS § V (1996) (providing specific comments on maintaining confidentiality and forbidding disclosure unless "required by law or other public policy"); ELROD, *supra* note 12, § 16:10, at 20-21 (announcing a "mediator-party privilege"); NEUMANN, *supra* note 14, at 124-125; Hobbs, *supra* note 6, at 349 (maintaining the integrity of the process). *But see* VA. CODE ANN. § 8.01-576.9 (Michie Supp. 1997); MOSTEN, *supra* note 12, at 34 (requiring parties to waive confidentiality in most situations, but honoring a request for confidentiality during private sessions if both parties agree); Moberly, *supra* note 6, at



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### III. ADVANTAGES OF MEDIATION

There are several reasons that give spouses incentive to forego the adversarial process and to choose mediation. Overall, mediation is touted as a procedurally manageable process that is expeditious and inexpensive. Mediation further helps parties to reconcile their differences with less animosity<sup>37</sup> so that compliance with their agreement is ensured.

The mediation process consumes less time than the traditional adversarial method of resolving disputes. The amount of time that it takes to settle a dispute ranges from three to twenty-five hours. Where the matter falls on that time spectrum depends upon the complexity and number of issues and the participants' personalities.<sup>38</sup> By comparison, litigants may wait six to twenty-four months just to get a trial date when they leave it to a judge to decide their fate.<sup>39</sup>

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713-714; Moore, *supra* note 22, at 700 (indicating that "confidentiality promotes the candor necessary for the mediator to uncover the interests of the parties"); cf. VA. CODE ANN. § 8.01-576.10 (Michie Supp. 1997) (permitting disclosure of financial information and reasons for deviation from the guidelines in child support cases). *But see* VA. CODE ANN. § 8.01-576.9 (Michie Supp. 1997) (allowing disclosure of otherwise confidential information in suits against the mediator).

<sup>37</sup> See Nancy Thoennes et al., *Mediation and Domestic Violence: Current Policies and Practices*, 33 FAM. & CONCILIATION CTS. REV. 6, 6-7 (1995); *see also* ELROD, *supra* note 12, § 16:05, at 9-10 (listing advantages of the mediation process for child custody determinations); H. WARREN KNIGHT ET AL., CALIFORNIA PRACTICE GUIDE-ALTERNATIVE DISPUTE RESOLUTION §§ 3:512, 3:513 (1995) (highlighting the advantages and disadvantages of mediation in domestic relations cases); Delgado et al., *supra* note 6, at 1366-1367, 1402 (noting benefits of the alternative dispute resolution process); Hobbs, *supra* note 6, at 336-337 (comparing the adversarial and the mediation processes); Moberly, *supra* note 6, at 703, 709 (reducing the court's caseload and offering cheaper, fairer and faster dispositions for the parties and their attorneys). *But see* Delgado et al., *supra* note 6, at 1391-1399 (discussing potential pitfalls of this informal process); Grillo, *supra* note 4, at 1547-1549, 1551 (reciting the proposed advantages of mediation but concluding that it does not "fulfill its promises" of being a "gentler alternative").

<sup>38</sup> See ELROD, *supra* note 12, § 16:13, at 24 (taking, on average, from 12 to 15 hours to mediate a dispute depending upon complexity and the parties' personalities); MOSTEN, *supra* note 12, at 33 (allocating an average of three to eight hours for mediation involving one issue and 10 to 25 hours for more complex mediation); NEUMANN, *supra* note 14, at 8-9 (scheduling approximately six 90-minute sessions). *But see* Grillo, *supra* note 4, at 1583 (complaining that commonly only one hour or less is set aside for mediation).

<sup>39</sup> See MOSTEN, *supra* note 12, at 62.

Another advantage of mediation is that it is cheaper than litigation. Mediation participants incur lower transaction costs than parties who choose the traditional litigation method. Couples who mediate their differences expend about one-fifth as much on legal fees as those couples who resolve their disputes in formal court proceedings.<sup>40</sup> Expenses associated with litigation in a courtroom setting can be three to five times as much as the cost of several mediation sessions.<sup>41</sup>

In private mediations, the disputants usually share the mediator's fee.<sup>42</sup> In court-annexed mediation, depending upon the circumstances, one, both or neither party pays for the mediator's services. In hardship cases, the process can be completed at no monetary cost to the parties.<sup>43</sup> Instead, the court may apportion money from grants or filing fees to pay the disputants' costs. Alternatively, the court may reduce the cost, order one party to pay all expenses or arrange for volunteers to provide pro bono mediation

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<sup>40</sup> See ELROD, *supra* note 12, § 16:12, at 23 (indicating that bench and custody investigation time for custody disputes costs \$1528 compared to less than \$300 for mediation of the same type of dispute); see also HAYNES, *supra* note 6, at 2; Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1142 (1988).

<sup>41</sup> See ELROD, *supra* note 12, § 16:12, at 23 (indicating that bench and custody investigation time for custody disputes cost \$1528 compared to less than \$300 for mediation of the same type of dispute); NEUMANN, *supra* note 14, at 39 (declaring that parties can save a lot of money and comparing legal fees, in one case, of \$12,500 to \$2455 in mediation expenses). Like attorney's fees, however, restrictions are placed on private mediation costs. Mediators' fees and expenses must be reasonable, fair, expressly stated and appropriate for the particular case. See AMERICAN ARBITRATION ASSOCIATION MODEL STANDARDS OF CONDUCT FOR MEDIATORS § VIII (1996) (requiring assessment of reasonable fees determined by the service provided, the complexity of the case, the mediator's expertise, the time commitment required and typical rates for the locality); NEUMANN, *supra* note 14, at 124; Hobbs, *supra* note 6, at 348-349 (promoting reasonable fees); Moberly, *supra* note 6, at 715-716 (billing for attendance at the session, preparation for the session, travel time, postponements, cancellations, drafting the agreement and any other mediation-related activity); see also Arnold, *supra* note 14, at 599 (charging from nothing to \$4000 per day depending upon the mediator's experience and other factors). Private mediator's fees are based on hourly rates which range from \$35 to \$375. See ELROD, *supra* note 12, § 16:12, at 23 (indicating that the average hourly range is from \$60 to \$125); NEUMANN, *supra* note 14, at 86-87 (estimating costs of \$45 to \$375 per hour depending upon the mediator's expertise, the type of case and the locality).

<sup>42</sup> See Fornari, *supra* note 18, at 12.

<sup>43</sup> See ELROD, *supra* note 12, § 16:12, at 23.

services.<sup>44</sup>

Finally, mediation is praised as an effective tool which fosters client autonomy, creates less acrimony and preserves family privacy.<sup>45</sup> Instead of relying upon courts and lawyers to impose decisions upon them, parties who choose mediation reach their own decisions about issues which have tremendous impact on their lives. Thus, they receive some satisfaction from controlling their own destiny. Furthermore, since they have to learn to communicate well enough to reach an agreement, mediation participants develop a better relationship for future interaction. Finally, a sense of family privacy—a matter that is of great importance to some couples—is maintained. In mediation, debates on some very personal and private issues are conducted in closed sessions.<sup>46</sup> As a consequence of these aspects of mediation, parties who resolve their disputes are more apt to honor their agreements.<sup>47</sup>

## IV. THE ROLE CULTURE PLAYS IN FAMILY MEDIATION

Culture is “the configuration of learned behavior and results of behavior whose components and elements are shared and transmitted by the members of a particular society.”<sup>48</sup> Culture represents “the ethos of a people as well as a way of life.”<sup>49</sup> Hence, a family member’s cultural

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<sup>44</sup> See NEUMANN, *supra* note 14, at 129 (urging mediators to accept some matters for nominal or no cost); Fornari, *supra* note 18, at 12; see also ALASKA STAT. § 25.20.080(e) (Michie 1996); IOWA CODE ANN. § 598.41(2)(e) (West Supp. 1997) (taxing mediation costs as the parties’ court costs); OHIO REV. CODE ANN. § 3109.052 (Banks-Baldwin 1995); VA. CODE ANN. § 8.01-576.7 (Michie Supp. 1997); Moore, *supra* note 22, at 690.

<sup>45</sup> See MOSTEN, *supra* note 12, at 55-67 (discussing benefits for mediation participants); Steven Bowman, *Idaho’s Decision on Divorce Mediation*, 26 IDAHO L. REV. 547, 549-551, 558-559, 572 (1990) (explaining why the traditional litigation method escalates a tumultuous situation); Bryan, *supra* note 18, at 190-191; Moberly, *supra* note 6, at 709. But see Richard Delgado, *Alternative Dispute Resolution, Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1395 (1997) (declaring that alternative dispute resolution may compound minority people’s disadvantages).

<sup>46</sup> See MOSTEN, *supra* note 12, at 60-61.

<sup>47</sup> See NEUMANN, *supra* note 14, at 7-8 (formalizing lasting agreements); Bowman, *supra* note 45, at 549-550, 572.

<sup>48</sup> COUNSELING AMERICAN MINORITIES, *supra* note 13, at 5.

<sup>49</sup> SADYE LOGAN ET AL., *SOCIAL WORK PRACTICE WITH BLACK FAMILIES: A*

background plays a critical role in the disposition of family disputes.

Generally, cultural factors are relevant concerns in dispute resolution.<sup>50</sup> Lawyers, judges, legal scholars, anthropologists and sociologists agree that culture is an important part of the process.<sup>51</sup> Those advocates of cultural consideration contend that judges and mediators should be aware of and respond to different cultural expectations.<sup>52</sup> Just as social scientists advise family therapists to consider cultural differences among African Americans and other Americans, mediators should also contemplate and address ways of dealing with these differences.<sup>53</sup>

In court proceedings, judges already have pondered the relevancy of culture in resolving family disputes. In 1995, the Supreme Court of Iowa affirmed a trial court's consideration of Hispanic culture in a child custody matter. In *In re Marriage of Kleist*,<sup>54</sup> the Mendezes were an interracial couple. Mr. Mendez was white, and Mrs. Mendez was Hispanic. They quarreled over which parent should receive permanent custody of their daughter Juliana.<sup>55</sup>

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CULTURALLY SPECIFIC PERSPECTIVE 24 (1990); see also HAKI MADHUBUTI, *BLACK MEN: OBSOLETE, SINGLE, DANGEROUS?: THE AFRIKAN AMERICAN FAMILY IN TRANSITION* 5-6 (1990) (including a people's politics, economics, language, science and technology in the definition).

<sup>50</sup> See Arnold, *supra* note 14, at 589; see also Vincent D. Foley, *Can a White Therapist Deal with Black Families?*, in *BLACK MARRIAGE AND FAMILY THERAPY*, *supra* note 13, at 244 (arguing that culture is an important part of family therapy).

<sup>51</sup> See Arnold, *supra* note 14, at 589; Allan Lind et al., *And Justice for All: Ethnicity, Gender, and Preferences for Dispute Resolutions Procedures*, 18 *LAW & HUM. BEHAV.* 269, 270 (1994); see also Carol King, *Are Justice and Harmony Mutually Exclusive? A Response to Professor Nader*, 10 *OHIO ST. J. ON DISP. RESOL.* 65, 82-88 (1994) (recognizing that cultural, gender and economic differences could affect the process but complaining that there is a lack of empirical support for these contentions).

<sup>52</sup> See John Arter Jackson, *Addressing Cultural Diversity in Custody Mediation*, Address at the 19th Annual International Conference, San Diego, California (Oct. 17-20, 1991) (encouraging mediators to become aware of "culturally based concerns"). Every judge must adhere to her judicial oath to "do right to all manner of people after the laws and usages of this realm, without fear of favor, affection, or ill-will." Fricker, *supra* note 4, at 413 (citing the traditional oath judges take in England and Wales upon appointment). Judge Fricker is a circuit court judge in Yorkshire, England and has written extensively in the family law area.

<sup>53</sup> See Wilson & Stith, *supra* note 13, at 109.

<sup>54</sup> 538 N.W.2d 273 (Iowa 1995).

<sup>55</sup> See *id.* at 275.

During a custody hearing, Mrs. Mendez testified that she was born in Havana, Cuba. When she was ten years old, she and her family immigrated to the United States.<sup>56</sup> Mrs. Mendez asserted that motherhood was a sacred role in Hispanic culture. She explained that Hispanic heritage dictated that mothers assume the primary caretaker's role for their young children, especially female children. Thus, Mrs. Mendez argued, she should receive custody of the Mendezes' female child. Furthermore, Mrs. Mendez opined that as a noncustodial parent she could not give Juliana the continuous nurturing, guidance and verbal interaction—in Spanish and English—that Juliana needed.<sup>57</sup>

In reaching a decision that Mrs. Mendez should be awarded custody, the trial judge considered the cultural beliefs that Mrs. Mendez had brought to his attention.<sup>58</sup> Two other factors were persuasive. As a teacher, Mrs. Mendez had more flexible work hours than Mr. Mendez, who was a family therapist. Therefore, the court decided that Mrs. Mendez had more time to spend with Juliana and to nurture her. Also, Juliana, who already had been placed in her mother's temporary care, appeared comfortable and satisfied with that arrangement.<sup>59</sup>

However, the appellate court condemned consideration of culture, regarding it as a pretext for re-instituting the tender years doctrine.<sup>60</sup> With that explanation, the court of appeals overruled the trial court's opinion and granted custody to Mr. Mendez.<sup>61</sup> After the Supreme Court of Iowa reviewed the record, it affirmed the trial court's original determination that Mrs. Mendez should have custody of Juliana. With respect to the cultural consideration, the court held as follows:

The fighting issue is the extent to which [Mrs. Mendez's] Hispanic

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<sup>56</sup> *See id.*

<sup>57</sup> *See id.* at 275, 277, 279.

<sup>58</sup> *See id.* at 276.

<sup>59</sup> *See id.* at 278.

<sup>60</sup> *See id.* Under the tender years doctrine, there was a presumption that young children should be placed with their mother. Supposedly, only a mother could provide the nurturing that a child of tender age needed. *See, e.g., Malone v. Malone*, 842 S.W.2d 621, 623, 625 (Tenn. Ct. App. 1992) (reversing the custody matter because the lower court failed to consider the doctrine as a factor). However, most states have abrogated statutes that allow custody determinations based on gender preferences. *See, e.g., NEB. REV. STAT. § 42-364(3)* (1996); *S.C. CODE ANN. § 20-7-1555* (Law Co-op 1996); *Vance v. Vance*, 436 N.W.2d 177, 178 (Neb. 1989).

<sup>61</sup> *See Marriage of Kleist*, 538 S.W.2d at 281.

heritage should be permitted, if at all, to impact the custody decision. On the one hand, we agree entirely with the court of appeals' expressed view that "we cannot let a person's cultural beliefs put him or her in a superior position when we assess the custody issue." At the same time, we do not believe a court should ignore the way in which a person's background shapes their attitude toward parenting. If a litigant held a fixed cultural belief that a genetic superiority of boys entitled them to greater opportunity than girls, for example, we would surely consider such a factor in the placement of a child. Likewise here, [Mrs. Mendez's] belief translates into a distinctive parenting style. Neither the ethnic origin of such a belief, nor the fact that she holds it, is controlling. What is important is the impact of that belief on her role as a parent.<sup>62</sup>

Another judge, Judge Nigel Fricker, acknowledged the importance of culture in this area.<sup>63</sup> He wrote:

Differing cultures, ethnic and indigenous, present issues of particular importance in family proceedings. Patterns of family structures vary substantially between different ethnic cultures, also between different indigenous social groups. For example, the relationships within extended families originally from the Indian subcontinent and from Afro-Caribbean culture are different from each other and from British indigenous patterns. . . . [T]he British practice of sending children to boarding schools seems cruel and difficult to understand to people from many different ethnic cultures, and perhaps to some indigenous groups.

These differences raise important questions and tensions as to how far members of ethnic cultures from other countries should be expected to adapt to essential British family law rights and responsibilities. . . . These

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<sup>62</sup> *Id.* at 277. In his dissent, Chief Justice McGiverin vehemently opposed the majority decision. *See id.* at 279–281. He reasoned that the Iowa legislature had not listed a parent's cultural disposition as a factor that should be considered when a court determines the child's best interest. Justice McGiverin further expressed grave concerns regarding Mrs. Mendez's volatile personality. There was evidence in the record that Mr. Mendez had sought a protective order to have Mrs. Mendez removed from the home, and that she freely engaged in emotional outbursts in Juliana's presence. *See id.* at 280–281. In contrast, Mr. Mendez was more even-tempered. *See id.* at 281. Thus, Judge McGiverin objected to the majority holding: "The trial court's award of physical care based in part on [Mrs. Mendez's] cultural disposition sets bad precedent with untold, unfortunate ramifications. Every parent desiring physical care could assert a like claim." *Id.* at 280.

<sup>63</sup> *See* Fricker, *supra* note 4, at 406–407.

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issues demand particular sensitivity from family lawyers and judges.<sup>64</sup>

Thus, Judge Fricker concluded that states are obligated to establish legal remedies for the protection of vulnerable members of ethnic groups.<sup>65</sup> These are only two examples of judicial recognition of the importance of culture in family matters. They represent a myriad of other cases.<sup>66</sup> Similarly, mediators should be trained to consider cultural differences while they are helping families to resolve disputes.

People from several different cultural backgrounds live in the United States. In this melting-pot country, ways of life and relating to other people vary as often as the physical features of the many people who reside here. Similarly, American culture differs from cultures of other people in the world.<sup>67</sup> Often, for example, in a business setting, American people separate social interaction from business transactions. In other cultures, business and social contacts merge more freely. Also, inapposite with American culture, people from other cultures consider it tactless for a person to flaunt his power. Likewise, aggressive behavior is shunned in other cultures. Finally, acceptable spatial distances between conversationalists differ among cultures.<sup>68</sup> Not surprisingly, members of diverse cultures interpret certain signals differently too. Among subcultures, different meanings are applied to facial expressions, eye contact, body language and voice inflections.<sup>69</sup>

Similarly, cultural differences between the mediator and disputants may affect the outcome of mediation. "In intercultural mediations, meaning those in which two or more of the individuals identify themselves with different cultural groups, an inadvertent act or omission may spell the end

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<sup>64</sup> *Id.* at 406.

<sup>65</sup> *See id.* at 406-407.

<sup>66</sup> *See, e.g.,* Rooney v. Rooney, 914 P.2d 212, 218 (Alaska 1996); Tubwon v. Weisberg, 394 N.W.2d 601, 604 (Minn. 1986); Jones v. Jones, 542 N.W.2d 119, 123 (S.D. 1996).

<sup>67</sup> *See* Charles B. Craver, *Effective Legal Negotiation and Settlement*, in NEGOTIATION: WINNING TACTICS AND TECHNIQUES 81, 126 (PLI Litig. & Admin. Practice Course Handbook Series No. 347, 1988).

<sup>68</sup> *See id.*; *see also* Wong, *supra* note 17, at 121.

<sup>69</sup> *See* JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 42 (1997) (suggesting that nonverbal cues "may fail in intercultural situations"); Jackson, *supra* note 52, at 69 (adding the priority that the mediator places on certain subjects as another devaluing signal).

of the process.”<sup>70</sup> Verbal and nonverbal miscues could cause mediation to be unproductive or terminated.

#### V. AFRICAN AMERICAN ATTITUDES ABOUT DISPUTE RESOLUTION AND OTHER MATTERS THAT MAY AFFECT MEDIATION

Race and ethnicity are intricately linked to culture.<sup>71</sup> Accordingly, African American people’s race and culture are inextricably connected:

[D]ifferent cultures value their common elements differently, insofar as one puts the accent here, another there, and that is the ordering and the relations of elements to one another that determines the differences between the cultures. Thus, culture is not a static entity, but ever changing. The backdrop of this process is the continuous and unifying stream in [African American] life which is a combination of Africa, the American south, slavery, poverty, migration, and racism. It is a stream expressed in music, family life, language, love, religion, and countless other manifestations of a people’s orientation to the world that constitutes [African American] culture.<sup>72</sup>

In the previous section, I concluded that culture is of critical importance in mediation of family issues. Because race and culture are intertwined, race becomes an integral part of mediation too.

Empirical studies have shown that race affects negotiations. For example, when adversaries are members of the same race, they bargain more cooperatively with one another. Same-race disputants are more cooperative because they trust each other more easily than they trust people of different racial groups. In contrast, intercultural adversaries endeavor to “maintain a certain face or posture in the eyes of someone different.”<sup>73</sup> This posturing influences the parties’ efforts to solve their problem.

Differences between white and African American cultures must be explored because traditional dispute resolution systems are universalistic and color-blind. Usually, white males design American dispute resolution systems based upon white middle-class families they selected as model

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<sup>70</sup> MICHELLE LEBARON DURYEA, *CONFLICT AND CULTURE: A LITERATURE REVIEW AND BIBLIOGRAPHY* 40 (1992); *see also* Wong, *supra* note 17, at 121.

<sup>71</sup> *See* LOGAN ET AL., *supra* note 49, at 24.

<sup>72</sup> *Id.* at 25; *see also* Wong, *supra* note 17, at 115 (adding “a unique dimension to mediation”).

<sup>73</sup> Craver, *supra* note 67, at 126.



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family structures. In the process, the creators ignored unique characteristics of African American families and families of other diverse cultures.<sup>74</sup>

Systems based on white family prototypes automatically exclude African American families that do not have the characteristics of the white family that is proffered as the model family.<sup>75</sup> A more appropriate system would reflect cultural values of people of color and their divergent social and physical environments.<sup>76</sup> Thus, mediators should tailor mediation sessions to African American family functioning in accordance with normative behavior in other African American families instead of relying upon inappropriate white family norms.<sup>77</sup>

Furthermore, race is a potential concern during mediation because the percentage of marital breakups among African American families is very high.<sup>78</sup> The divorce rate for African American couples is much higher than the rate of divorce among white American couples.<sup>79</sup> For example, in a 1992 survey, twenty-three percent of African American men and thirty-nine

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<sup>74</sup> See DURYEA, *supra* note 70, at 46 (noting differences among cultures and dangers of ignoring them); Arnold, *supra* note 14, at 590-591 (imploing mediators to consider the parties' culture); Lind et al., *supra* note 51, at 269-271; *see also* McFadden, *supra* note 13, at 210 (stating that African American families have their "own values, norms, and sanctions"); Wade W. Nobles, *African American Family Life: An Instrument of Culture*, in BLACK FAMILIES 83, 88 (Harriette Pipes McAdoo ed., 3d ed. 1997) (advocating that it is inappropriate to interpret African American families using a white "analytic framework").

<sup>75</sup> See LOGAN ET AL., *supra* note 49, at 43; *cf.* Grillo, *supra* note 4, at 1556 (indicating that violation of unwritten norms may produce "strong reactions").

<sup>76</sup> See DURYEA, *supra* note 70, at 24; Wilson & Stith, *supra* note 13, at 106-107.

<sup>77</sup> See Wilson & Stith, *supra* note 13, at 107; *see also* DURYEA, *supra* note 70, at 50 (suggesting that mediators be trained regarding cultural differences).

<sup>78</sup> See ANDREW BILLINGSLEY, CLIMBING JACOB'S LADDER: THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES 241 (1992); NANCY BOYD-FRANKLIN, BLACK FAMILIES IN THERAPY: A MULTISYSTEMS APPROACH 67 (1989) (noting that the divorce rate has risen for members of all ethnic groups); Melvin N. Wilson, *The Context of the African American Family*, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE 85, 107 (Joyce E. Everett et al. eds., 1991) (dissolving marriages at the rate of 58% in 1989).

<sup>79</sup> See Reynolds Farley & Suzanne M. Bianchi, *The Growing Racial Difference in Marriage and Family Patterns*, in THE BLACK FAMILY: ESSAYS AND STUDIES 57 (Robert Staples ed., 4th ed. 1991); *see also* Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, FUTURE CHILDREN, Spring 1994, at 29, 32 (indicating that 47% of African American marriages compared with 28% of white marriages end in divorce).

percent of African American women reported that they were divorced. Those percentages were compared with divorce statistics for all other people. Only thirteen percent of all non-African American men and eighteen percent of all non-African American women reported that they were divorced.<sup>80</sup>

Because numerous African American marriages end in divorce, it is conceivable that many African Americans will appear before tribunals to resolve child custody, child support and other family issues. Some of them will choose to forego the traditional adversarial method of dispute resolution and mediate their disputes. Therefore, this section addresses some general aspects of African American culture that may influence an African American's participation in mediation sessions.

However, mediators should exercise caution in attributing stereotypical beliefs to all African American families. Each African American family and each member of that family is a unique individual. The practices discussed may not apply to all of them. For instance, some proponents argue that African American family values and practices vary along class lines.<sup>81</sup> Instead, mediators should consider whether a particular dispute resolution model is appropriate for the specific African American family with whom they are working.<sup>82</sup> Yet, mediators may rely upon empirical data to help them understand individual African American behavior.<sup>83</sup> The discussions in the following paragraphs highlight African American cultural traits that mediators should recognize and respond to, if appropriate, for ensuring productive mediation sessions.

"Competent mediation requires awareness and understanding of all

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<sup>80</sup> See Paul C. Glick, *Demographic Pictures of African American Families*, in BLACK FAMILIES, *supra* note 74, at 127; see also MAN KEUNG HO, FAMILY THERAPY WITH ETHNIC MINORITIES 187 (1987) (noting double the white divorce rate for African Americans). In the late 1970s, the rate of separation or divorce for white women was 21% and 38% for African American women. See Farley & Bianchi, *supra* note 79, at 8. In 1985, 18% of African American men and 33% of African American women were divorced as compared to 10% of all other men and 15% of all other women. See Paul C. Glick, *Demographic Pictures of Black Families*, in BLACK FAMILIES, *supra* note 13, at 112.

<sup>81</sup> See HACKER, *supra* note 13, at 67-68; see also BOYD-FRANKLIN, *supra* note 78, at 205-219 (discussing patterns for middle-class African Americans); McFadden, *supra* note 13, at 210 (indicating that all African American families do not fit a particular model).

<sup>82</sup> See DURYEA, *supra* note 70, at 40; Wilson & Stith, *supra* note 13, at 106-107.

<sup>83</sup> See Wilson & Stith, *supra* note 13, at 106-107.

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issues relevant to the disputants and the matter to be resolved. This accomplished, the mediator is charged with determining the appropriate response regarding the issue's introduction into the process."<sup>84</sup> To avoid misinterpretations and misunderstandings that may have negative effects on mediation sessions, mediators should be educated about cultural practices and issues that affect how African American families operate. Ideally, a knowledgeable mediator will be able to "identify [the] elements of the [party's] behavior [that] may be attributed to living in a hostile environment, to a coping style, and what might be characterological."<sup>85</sup> More importantly, mediators should "[l]earn to acknowledge and to be comfortable with [their] client[s'] cultural differences."<sup>86</sup>

More specifically, mediators involved in resolution of family disputes should endeavor to understand dissimilarities between African American and white familial experiences.<sup>87</sup> Knowledge, respect and acceptance of differences between white and African American families is relevant because African Americans and white Americans do not have identical backgrounds or views of the world.<sup>88</sup> In a speech in 1995, President Clinton declared that "white Americans and [African] Americans see the world in drastically different ways."<sup>89</sup>

### A. Racism

A pivotal difference between African American and white participants is that racism has psychological affects on African American people. The intrusion is constant.<sup>90</sup> The feeling of "pain, cruelty, stress, and

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<sup>84</sup> Jackson, *supra* note 52, at 70.

<sup>85</sup> LOGAN ET AL., *supra* note 49, at 33.

<sup>86</sup> Wilson & Stith, *supra* note 13, at 109; *see also* Sandra T. Azar & Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights*, 18 LAW & HUM. BEHAV. 249, 264 (1994) (advocating need for "culturally knowledgeable and sensitive" forensic evaluators and judges for making termination of parental rights and custody decisions).

<sup>87</sup> *See* Wilson & Stith, *supra* note 13, at 102-103.

<sup>88</sup> *See* LOGAN ET AL., *supra* note 49, at 44-47; Wong, *supra* note 17, at 116-117.

<sup>89</sup> President Bill Clinton, Address to the Liz Sutherland Carpenter Distinguished Lectureship in the Humanities and Sciences at the University of Texas at Austin (Oct. 16, 1995), *available in* 1995 WL 608252, at \*5.

<sup>90</sup> *See* Lorraine Brannon, *Marriage and Family Therapy with Black Clients: Method and Structure*, in BLACK MARRIAGE AND FAMILY THERAPY, *supra* note 13, at

debasement" are symptomatic of racism.<sup>91</sup> As a result, African Americans' world view is shaped by decades of oppression, institutionalized racism and economic deprivation.<sup>92</sup>

Another consequence of racism is that African Americans suffer "unique psychological, environmental, and economic stresses" that affect their family life.<sup>93</sup> So, in addition to normal family difficulties that all kinds of families experience, African Americans have to cope with added marital strains of racism and discrimination. For a proper understanding of contemporary African American family life, a mediator must examine cultural influences and methods by which African American families adapt to segregation and discrimination.<sup>94</sup> Therefore, as mediators attempt to assist African American families to resolve domestic disputes, they must be sensitive to how racism and prejudice have affected African American family life.<sup>95</sup> As indicated, racism may shape African American participants' interaction with each other and their facilitator.<sup>96</sup>

## B. Mistrust

Before the mediator can even begin to assist the parties to define and

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174-177 (discussing the continuous and daily effect of racism); *see also* HACKER, *supra* note 13, at 75 (placing "extra burdens on a marriage"); Delgado et al., *supra* note 6, at 1390 (describing some of the daily experiences of racism such as "'slights, rebuffs, forbidden opportunities'") (quoting GEORGE EATON SIMPSON & J. MILTON YINGER, *RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION* 192 (4th ed. 1972)); Nobles, *supra* note 74, at 83-84 (finding that African American family life is affected by "real and definite problems and conditions associated with racism and oppression").

<sup>91</sup> McFadden, *supra* note 13, at 217; *see also* MADHUBUTI, *supra* note 49, at 207-210 (discussing the daily reality of racism).

<sup>92</sup> *See* Richard A. English, *Diversity of World Views Among African American Families*, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE, *supra* note 78, at 20-26 (explaining differences in world views); *see also* LOGAN ET AL., *supra* note 49, at 47.

<sup>93</sup> Wilson & Stith, *supra* note 13, at 105; *see also* LOGAN ET AL., *supra* note 49, at 40-43; English, *supra* note 92, at 21-22 (writing about the profound consequences of racism).

<sup>94</sup> *See* LOGAN ET AL., *supra* note 49, at 3; *see also* Wilson & Stith, *supra* note 13, at 109 (imploing therapists to learn historical and current information about what it is like to be an African American in America).

<sup>95</sup> *See* BOYD-FRANKLIN, *supra* note 78, at 207 (asking family therapists to become aware of the impact that racism and oppression have on African American people).

<sup>96</sup> *See* DURYEA, *supra* note 70, at 42.

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resolve their issues, she may have to win the participants' trust. Many African Americans distrust non-African Americans, especially white Americans.<sup>97</sup> This suspicion of white Americans derives from direct or indirect exposure to racism.<sup>98</sup>

A complete history of the injustices African Americans have endured is beyond the scope of this article. However, a few examples may help mediators to understand the origin of African Americans' reluctance to trust their white counterparts. White Americans did not allow African Americans to vote, to be educated, to be witnesses or jurors in adversarial proceedings, to travel freely or to marry whomever they wanted to marry.<sup>99</sup> White people lynched and murdered African Americans for acts as harmless as speaking to a white woman.<sup>100</sup> Consequently, some advocates believe that this distrust is a "healthy cultural paranoia" because it helps African Americans to survive.<sup>101</sup>

Trust and rapport are essential components of mediation. These elements are material because they set the tone for interaction between the participants and the mediator during sessions. In some situations, it may be more difficult for the mediator to achieve much-needed trust and rapport with participants who experienced racism. Because of their distrust and

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<sup>97</sup> See HO, *supra* note 80, at 183; Brannon, *supra* note 90, at 177-178; Wilson & Stith, *supra* note 13, at 103.

<sup>98</sup> See Brannon, *supra* note 90, at 177; Wilson & Stith, *supra* note 13, at 103; see also BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY: COLOR BLINDNESS AND THE END OF AFFIRMATIVE ACTION 29 (1997) (teaching an African American child to be careful around white people, even friendly ones, because many of them discriminate against African Americans).

<sup>99</sup> See *Loving v. Virginia*, 388 U.S. 1 (1966); FAIR, *supra* note 98, at 2-3, 67-113 (advocating that privileges in the United States are meted out by race); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944 24 n.56, 75-76 n.121, 185 n.268, 273, 300 (1993).

<sup>100</sup> See JEFFREY C. STEWART, 1001 THINGS EVERYONE SHOULD KNOW ABOUT AFRICAN AMERICAN HISTORY 162-163 (1996) (writing about an African American teenager who was beaten, strangled and shot because he spoke to a white woman). See, e.g., SMITH, *supra* note 99, at 315-316 n.186, 538 n.283.

<sup>101</sup> HO, *supra* note 80, at 183 (quoting WILLIAM H. GRIER & PRICE M. COBBS, BLACK RAGE 161 (1968)); see also Brannon, *supra* note 90, at 177; Delgado et al., *supra* note 6, at 1378-1383 (discussing how sensitivity to prejudicial behavior develops from the time that children reach age three). Still, although it is of crucial importance for mediators to be sensitive to the harmful effects of racism, they should be cautioned that it would be inappropriate to attribute all African American family problems to racism. See Brannon, *supra* note 90, at 177.

suspicion, African American participants may "check[] out [the white mediator's] . . . appearance, race, skin color, clothing, perceived social class, language, and a range of more subtle clues such as warmth, genuineness, sincerity, respect for the [participants], willingness to hear the [participants'] side, patronizing attitudes, condescension, judgments, and human connectedness."<sup>102</sup>

When African American family members do not trust their facilitator, do not have good rapport with her or are uncomfortable with her, they may be passive or nonverbal during the session.<sup>103</sup> Obviously, in that type of atmosphere, minimal progress on settling the family problems will be made. On the other hand, if the participants trust the mediator and feel that they are being heard, they will speak more freely and discuss any issues, even contentious issues.<sup>104</sup> If necessary, mediators could utilize private caucuses to build trust among reluctant participants. Throughout the process, mediators should encourage all disputants to participate fully and reassure them that they will be treated fairly.

### C. Prejudice

Another characteristic that will help the mediator to gain participants' confidence and trust is impartiality.<sup>105</sup> The Model Standards of Conduct for

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<sup>102</sup> BOYD-FRANKLIN, *supra* note 78, at 96 (noting African Americans' socialization to pay attention to nonverbal as well as verbal behavior); *see also* Wilson & Stith, *supra* note 13, at 107-108.

<sup>103</sup> *See* HO, *supra* note 80, at 191, 193; Delgado et al., *supra* note 6, at 1390-1391 (indicating that a variety of emotions may be triggered including apathy, defeatism, avoidance, aggression and acceptance); Wong, *supra* note 17, at 115 (calling a trusting relationship essential). This reaction is similar to the manner in which some African American families exhibited their anger or frustration with white family therapists. *See* HO, *supra* note 80, at 191.

<sup>104</sup> *See* BOYD-FRANKLIN, *supra* note 78, at 62-63 (suggesting that family therapists create an atmosphere in which the participants will talk freely); *see also* Arnold, *supra* note 14, at 590 (indicating that parties want to be heard); McFadden, *supra* note 13, at 221 (declaring that African Americans must trust therapists before they will share pertinent information with the therapist and the therapist's response will influence the level of disclosure).

<sup>105</sup> *See* AMERICAN ARBITRATION ASSOCIATION MODEL STANDARDS OF CONDUCT FOR MEDIATORS § II (1996) (discussing the centrality of impartiality); ELROD, *supra* note 12, § 16:07, at 14; Arnold, *supra* note 14, at 591 (wanting impartial and neutral mediators); Hobbs, *supra* note 6, at 350, 352-353, 367-374 (explaining differences and

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Mediators mandates that “[a] mediator should guard against partiality or prejudice based on the parties’ personal characteristics, background or performance at the mediation.”<sup>106</sup> Mediators must strive to uphold this standard.

Just as racial and ethnic prejudices arise during court proceedings, they may arise during mediation.<sup>107</sup> Actually, the way in which this form of dispute resolution is conducted may breed racism.<sup>108</sup> People who are biased against other groups of people tend to reveal their prejudices more openly in private or closed meetings, like mediation, than they would in more public fora like courtrooms.<sup>109</sup> Moreover, it is easier for prejudice to creep into the mediation process because formal rules that minimize biased judicial decisions, such as rules of evidence, do not apply in mediation. Because these rules do not exist to constrain the mediator, the chance that bias will infiltrate the process is heightened.<sup>110</sup>

Some may argue that a mediator’s biases may not matter anyway because the disputants, not the mediator, make the decisions. Certainly, the participants make the final decisions, but the mediator facilitates the decisionmaking process. In some states, though, mediators work under a legislative mandate requiring diligent efforts to assist the parties to settle

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tensions between impartiality and neutrality); Moberly, *supra* note 6, at 712–713 (requiring the mediator to withdraw when she cannot be impartial). *But see* Grillo, *supra* note 4, at 1587–1588 (calling impartiality a myth, but an important goal); Wong, *supra* note 17, at 116 (doubting that “perfect impartiality” can be achieved).

<sup>106</sup> AMERICAN ARBITRATION ASSOCIATION MODEL STANDARDS OF CONDUCT FOR MEDIATORS § II. By comparison, the Academy of Family Mediators defined impartiality as “freedom from favoritism or bias, either in word or action. Impartiality implies a commitment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement.” NEUMANN, *supra* note 14, at 123. This provision seems to focus on equal treatment of both sides, another critical consideration, but not on racism.

<sup>107</sup> See Grillo, *supra* note 4, at 1590.

<sup>108</sup> See Delgado et al., *supra* note 6, at 1367, 1391, 1398–1399 (citing sources suggesting that formalities of in-court proceedings protect people of color from prejudice); cf. Delgado et al., *supra* note 6, at 1367–1374 (advocating that procedural rules and other restraints minimize judicial and juror bias in formal adjudication proceedings).

<sup>109</sup> See *id.* at 1391, 1400 (increasing chances of prejudice in intimate settings); see also Grillo, *supra* note 4, at 1590 (agreeing that the potential for racial bias increases in the informal mediation process because prejudiced individuals tend to monitor their behavior in more public settings).

<sup>110</sup> See Delgado et al., *supra* note 6, at 1400; Dickson, *supra* note 19, at 37.

their disputes.<sup>111</sup> It would be ill-advised for a mediator to reveal her bias against any participant because it will have detrimental affects on the participants' ability to resolve their problems. A mediator's bias and prejudice could cause the parties to halt their efforts to find solutions themselves and allow a judge to decide the outcome. Other parties who feel the mediator is prejudiced may walk out.<sup>112</sup> If at any time during the mediation process, the mediator realizes that racial prejudice prevents her from being impartial, she must withdraw as the mediator for that matter.<sup>113</sup>

#### D. Stereotypes

Unconscious and unfounded stereotypes may influence the mediator's perception of a disputant and that perception may be manifested in negative, nonverbal undertones. In turn, the mediator's behavior may trigger a negative reaction from the disputant. For a white mediator to break down racial barriers between herself and African American disputants, she must consciously control stereotyping and negative attitudes about African Americans.<sup>114</sup> To accomplish that objective, mediators should weigh their own personal values and prevent those values from influencing the mediation process. "Stereotyping cultural groups indiscriminately prevents accounting for situational differences; that is, not all persons of a similar ethnic group exhibit the expected behavior in all situations, and much is dependent on the individual's degree of acculturation."<sup>115</sup>

Otherwise, the mediator's stereotypical notions about African

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<sup>111</sup> See, e.g., CAL. FAM. CODE § 3180(b) (West 1994).

<sup>112</sup> See MOSTEN, *supra* note 12, at 57; see also Delgado et al., *supra* note 6, at 1390.

<sup>113</sup> See AMERICAN ARBITRATION ASSOCIATION MODEL STANDARDS OF CONDUCT FOR MEDIATORS § II (1996) (obligating the mediator to withdraw if she is unable to be impartial).

<sup>114</sup> See NEUMANN, *supra* note 14, at 92 (urging mediators to keep gender bias from affecting the participants' decisionmaking process); Craver, *supra* note 67, at 125 (talking about transference and counter-transference because of stereotypes). See generally ARMOUR, *supra* note 69; Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989) (explaining how individuals may consciously suppress stereotypical beliefs); Patricia G. Devine et al., *Prejudice With and Without Compunction*, 60 J. PERSONALITY & SOC. PSYCHOL. 817 (1991).

<sup>115</sup> Wong, *supra* note 17, at 116 (citation omitted); see also Wilson & Stith, *supra* note 13, at 109.



Americans could have a detrimental impact on the success of the mediation session. Participants may choose not to mediate with a facilitator who uses inappropriate or negative language that the participants find offensive.<sup>116</sup> This could cause a complete breakdown in negotiations or result in an unfair settlement for one or both parties. Ultimately, mediation may be terminated because the mediator will be unable to help the family to dispose of its issues.<sup>117</sup>

### E. Language Barriers

To communicate with others, some African Americans use "Black English." Black English, sometimes called Ebonics or vernacular English, blends European and African languages.<sup>118</sup> On occasion, approximately eighty percent of African Americans speak it.<sup>119</sup>

Sometimes, the meanings of terms used in Black English differ from meanings commonly applied to words by whites. To illustrate, depending upon whether the word is stressed or unstressed, different meanings may be associated with the word "been." When it is unstressed, as in the sentence "He been married," it means that this man was married, but he is not married now. The meaning of the same sentence would change, however, if the word "been" was stressed. In that instance, "been" indicates that this man is married and that he has maintained that status for a very long time.<sup>120</sup> Another example is "she be here" which means that "she occasionally is here, not, as is often understood by white listeners, that she is here right this moment."<sup>121</sup>

Because so many African Americans use Black English, some may use

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<sup>116</sup> See NEUMANN, *supra* note 14, at 11 (changing statutory words like custody and visitation because of their negative connotations).

<sup>117</sup> See *id.* at 93 (destroying mediation with the perception of bias).

<sup>118</sup> See Liz McMillen, *Linguists Find the Debate over 'Ebonics' Uninformed*, CHRON. OF HIGHER EDUC., Jan. 17, 1997, at A16, A16 (discussing differing views about Black English).

<sup>119</sup> See Paula Gomes & C. Aldrena Mabry, *Negotiating the World: The Developmental Journey of African American Children*, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE, *supra* note 78, at 167.

<sup>120</sup> See McMillen, *supra* note 118, at A17; see also A.J. VERDELLE, *THE GOOD NEGRESS* 186-193 (1995) (expressing gratitude for a white teacher who taught her how to enunciate clearly and to speak using proper English).

<sup>121</sup> McMillen, *supra* note 118, at A17.

it in mediation sessions, and it may be misinterpreted by mediators who do not understand it. Misunderstandings and inappropriate responses can lead to a communication gap, confusion and frustration between the mediator and the African American participant. A person may be viewed as "uncooperative, sullen, negative, nonverbal, or repressed on the basis of language expression alone."<sup>122</sup> More dramatically, a mediator may decide to ignore an African American with whom the mediator is having difficulty communicating.<sup>123</sup>

Another potential response is that the mediator may perceive African Americans who use Black English as incompetent or uneducated and disrespect them. The mediator may patronize or penalize mediation participants who use Black English.<sup>124</sup> In turn, the participant may terminate the session or have difficulty in trusting the mediator.<sup>125</sup> "Dialogue is silenced through power relations that delegitimize arguments

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<sup>122</sup> Wilson & Stith, *supra* note 13, at 107 (citation omitted).

<sup>123</sup> See *Martin Luther King Junior Elementary Sch. Children v. Ann Arbor Sch. Dist. Bd.*, 473 F. Supp. 1371, 1381-1383 (E.D. Mich. 1979) (discussing how white teachers ignored Black English and effectively hindered African American children's opportunities to learn); John J. Attinasi, *Racism, Language Variety, and Urban U.S. Minorities: Issues in Bilingualism and Bidialectalism*, in RACE 319, 332-333 (Steven Gregory & Roger Sanjek eds., 1994) (indicating how different vernaculars have "enhanced the institutional vitality of nonmainstream cultures and their accompanying language varieties"); Jackson, *supra* note 52, at 70 (listing potential responses a mediator may have to a disputant's issues as ignoring, dismissing or disqualifying issues); Claudia Mitchell-Kernan, *Linguistic Diversity in the Service Delivery Setting: The Case of Black English*, in THE AFRO-AMERICAN FAMILY—ASSESSMENT, TREATMENT, AND RESEARCH ISSUES 85 (Barbara Ann Bass et al. eds., 1982). But see Margo Jefferson, *The 2 Faces of Ebonics: Disguise and Giveaway*, N.Y. TIMES, Jan. 7, 1997, at C11 (indicating that African Americans and whites use Black English in books, song lyrics, performances and so on to make a profit).

<sup>124</sup> See Wilson & Stith, *supra* note 13, at 107; Jefferson, *supra* note 123, at C11. One author described how some people respond to African American speakers:

It is doubly devastating when the speaker is both from a minority group and a woman. The setting might be a staff meeting. An issue is on the table. Various persons are giving presentations or opinions. When an African American . . . takes the floor and begins to speak, the focus of attention is broken. People refer to papers, move in their seats, get a coffee, begin a side conversation. Afterwards, they say that the person had a point but that it wasn't clear, couldn't be followed, was off the mark.

Attinasi, *supra* note 123, at 336.

<sup>125</sup> See Wilson & Stith, *supra* note 13, at 107.

and ideas that are not articulated in acceptable discourse or fashionable jargon . . . . Silence itself is also a powerful form of linguistic discrimination, especially when lack of response or long delays may repress or abort communication.”<sup>126</sup>

Mediators are charged with the arduous responsibility of encouraging two disputants, who have been unable to solve their own problems, to communicate and negotiate. They must help the parties to understand each other. This is done through reflection, acknowledgment and listening.<sup>127</sup> Then mediators clarify the parties’ issues and their positions on those issues. In order to do that, mediators must understand the parties’ views and issues well enough to articulate them.

Mediators must engage all parties.<sup>128</sup> Not only should a mediator respect this mode of communication, but also she should become generally familiar with this language.<sup>129</sup> Alternatively, when mediators do not understand a statement, they may ask, respectfully, for clarification.

## F. Respect

Respect strongly affects how African Americans react to non-African Americans.<sup>130</sup> Often, white Americans disrespect African Americans.<sup>131</sup> The following paragraphs offer examples of disrespect and ways in which mediators may show proper regard for African American participants.

One way in which a mediator can show respect is to refrain from referring to adult African Americans by their first names without permission.<sup>132</sup> By becoming too familiar with an African American person,

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<sup>126</sup> Attinasi, *supra* note 123, at 323.

<sup>127</sup> See MOSTEN, *supra* note 12, at 63 (showing how mediators can teach participants to communicate effectively with each other); *see also* Wong, *supra* note 17, at 114 (steering the parties to a mutual agreement).

<sup>128</sup> See ELROD, *supra* note 12, § 16:07, at 14.

<sup>129</sup> See Wilson & Stith, *supra* note 13, at 109 (asking family therapists to be aware of how failures to communicate may negatively influence therapeutic sessions).

<sup>130</sup> See Mary Jones, Adoption and the African American Child: A Guide for Agencies, at 5; *see also* NEUMANN, *supra* note 14, at 88–89 (encouraging participants to discern whether the mediator is respectful).

<sup>131</sup> See BOYD-FRANKLIN, *supra* note 78, at 65 (ignoring African American men); Nobles, *supra* note 1.

<sup>132</sup> See HO, *supra* note 80, at 193; *see also* BOYD-FRANKLIN, *supra* note 78, at 135 (advising therapists that older family members may be offended by informal

a mediator may be perceived as disrespectful. Mrs. Annie Mae Walker, Urcelle Brown's mother, is a stately, seventy-four year-old grandmother. Most African Americans honorably respect elderly members of their immediate family as well as elders in the community like Mrs. Walker.<sup>133</sup>

Actually, this element of respect applies whenever the person addressed is older than the speaker. Many African Americans would consider it an insult if a younger person called them by their first name.<sup>134</sup> By referring to older persons by their first names, the mediator innocently may be attempting to be friendly and casual.<sup>135</sup> Without permission to be informal, however, African American participants may be offended, harbor un verbalized anger or view the mediator as disrespectful.<sup>136</sup> For instance, the mediator may offend, and probably anger, Mrs. Walker by calling her "Annie Mae" during a session to resolve issues concerning Marcus and Chanika LeShaun.<sup>137</sup>

To eliminate the possibility that this situation would arise, mediators should simply ask adult participants what they want to be called.<sup>138</sup> Another solution would be the use of formal titles for everyone except children. In each session, the mediator should listen to and speak to all participants with respect.<sup>139</sup> Disrespect will hinder the mediator's ability to help the

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greetings).

<sup>133</sup> See Roberta J. Turner, *Affirming Consciousness: The Africentric Perspective*, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE, *supra* note 78, at 50-51 (treating elders with "great deference"). Because elders are valued members of the community, more African Americans keep their elderly relatives in their homes instead of placing them in nursing homes. This is contrasted with the white American custom of placing more elders in nursing homes. *See id.*

<sup>134</sup> See Jones, *supra* note 130, at 5 (indicating that African Americans who have been neighbors for 40 years may continue to refer to each other by a title such as Mrs. and Mr.); *see also* Niara Sudarkasa, *African American Families and Family Values*, in BLACK FAMILIES, *supra* note 74, at 33-34; Julianne Malveaux, *Southern Change Deserves Embrace*, USA TODAY, July 18, 1997, at 15A (complaining that a 20 year-old white "boy" had called her 70 year-old aunt by her first name).

<sup>135</sup> See Jones, *supra* note 130, at 6; *see also* MOSTEN, *supra* note 12, at 31 (recommending greeting each person by his or her first name as the orientation session begins).

<sup>136</sup> See HO, *supra* note 80, at 193.

<sup>137</sup> See HO, *supra* note 80, at 193; Jones, *supra* note 130, at 5, 6.

<sup>138</sup> See BOYD-FRANKLIN, *supra* note 78, at 135 (advising therapists to get a family member's permission before using an informal method of greeting).

<sup>139</sup> See Dickson, *supra* note 19, at 36, 41, 43, 44.

participants negotiate a settlement. African Americans who sense the mediator's disrespect or unconnectedness may either refuse to participate in mediation or fail to cooperate fully.<sup>140</sup>

Nonverbal communication can be just as disrespectful. In intercultural mediations, eye contact and body language can be misinterpreted.<sup>141</sup> Therefore, mediators must be cognizant of their posture and other gestures that may signal disrespect or disinterest.<sup>142</sup> At all times, the mediator should show interest in what the speakers are saying, listen to them and maintain eye contact with them.<sup>143</sup> Mediators always should "[c]onvey to each family member [in verbal and nonverbal mannerisms] . . . that [the family member's] input is valued and important."<sup>144</sup>

"A feeling of respect is an extremely important ingredient. . . . [African American] families are very sensitive to a sense of being condescended to."<sup>145</sup> Typically, African Americans respond to disrespect in one of two ways: (1) by withdrawing, or (2) by becoming disruptive.<sup>146</sup> Similarly, African Americans who feel that a mediator disrespects them may withdraw or become disruptive. In either event, the mediation session will be unproductive and efforts to mediate the family's issues could be thwarted.<sup>147</sup>

As far as many African Americans are concerned, whether they are respected is more crucial than the success of the mediation. Of similar significance, whether African Americans are satisfied with the resolution of

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<sup>140</sup> See BOYD-FRANKLIN, *supra* note 78, at 96-97 (indicating that African American families will leave treatment if the therapist does not connect with each family member).

<sup>141</sup> See ARMOUR, *supra* note 69, at 42; Wong, *supra* note 17, at 122.

<sup>142</sup> See DURYEA, *supra* note 70, at 40 (suggesting that those involved in dispute resolution "be aware of the meanings of nonverbal communication to those with whom they are working").

<sup>143</sup> See Dickson, *supra* note 19, at 39.

<sup>144</sup> BOYD-FRANKLIN, *supra* note 78, at 135; *see also* Arnold, *supra* note 14, at 591 (telling mediators that parties want their respect).

<sup>145</sup> *Id.*

<sup>146</sup> See Jones, *supra* note 130, at 6 (reporting that an African American woman withdrew from the adoption process because a caseworker disrespected her); *see also* Brannon, *supra* note 90, at 180 (indicating that withdrawal is "a natural response to a threatening situation"); Nobles, *supra* note 1 (predicting that African Americans will withdraw or be disruptive).

<sup>147</sup> See DURYEA, *supra* note 70, at 40.

their dispute will depend largely upon how the mediator treats them.<sup>148</sup> “[M]any minority participants will press their claims most vigorously when they believe that what they do and say will make a difference, that the structure will respond, and that the outcome is predictable and related to effort and merit.”<sup>149</sup>

### G. Collectivism

During dispute resolution, participants are categorized as either collectivists or individualists. Collectivists focus on in-groups and prefer conciliatory and amicable resolutions. Individualists concentrate more on pleasing themselves.<sup>150</sup> Another distinguishing factor is that when collectivists communicate with others they are more attentive to the speaker’s “verbal associations, gestures, body posture and [] facial muscles.”<sup>151</sup>

Normally, African Americans tend to be collectivists while white Americans tend to be individualists.<sup>152</sup> Since African Americans are

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<sup>148</sup> See Moberly, *supra* note 6, at 709 (basing satisfaction with mediation and the potential of adherence to the settlement agreement on the parties’ perceptions and expectations); Wong, *supra* note 17, at 117 (warning mediators that considering culture and race will affect the participants’ level of satisfaction); see also Delgado et al., *supra* note 6, at 1391 (stating that people of color will participate more willingly if they believe their reasonable efforts will be rewarded).

<sup>149</sup> Delgado et al., *supra* note 6, at 1402.

<sup>150</sup> See DURYEA, *supra* note 70, at 40; Lind et al., *supra* note 51, at 272; Wilson, *supra* note 78, at 87.

<sup>151</sup> DURYEA, *supra* note 70, at 40–41. For more examples, see *infra* Part VI.A.

<sup>152</sup> See BILLINGSLEY, *supra* note 78, at 333; Lind et al., *supra* note 51, at 272, 278 (finding that Hispanic Americans and Asian Americans are collectivists too); Turner, *supra* note 133, at 47 (distinguishing Eurocentric individualism from Africentric collectivity); cf. MADHUBUTI, *supra* note 49, at 6 (stating that “survival of the fittest” attitudes apply instead of collectivity principles); Sudarkasa, *supra* note 134, at 35 (concluding that the current trend is a “me and mine” generation instead of “thee and thine”). But see Lind et al., *supra* note 51, at 280 (finding that African Americans prefer arbitration over mediation).

Three other findings describe African American characteristics that may affect mediation. First, in the dispute resolution process, African Americans negotiate more cooperatively than white Americans. See Craver, *supra* note 67, at 126. Second, another African American trait that may influence mediation is that African American families tend to be goal-oriented and they prefer to solve problems in concrete terms. See HO, *supra* note 80, at 193. Finally, African Americans are emotional people. See

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collectivists, they will be more attentive to the mediators' verbal and nonverbal mannerisms. Moreover, African Americans can be *expected* to be more comfortable with conciliatory proceedings like mediation.

To summarize, even without racial and cultural considerations, mediation of divorce and other family issues can spark an emotionally charged atmosphere. In any mediation of family disputes, asstrays may be used as weapons and opposing parties may kick each other underneath the table.<sup>153</sup> Add negative racial undertones and cultural bias to these sessions and the already charged atmosphere could become even more electrified and explosive. If mediators are mindful of the potential concerns discussed in this section, they can control counterproductive verbal and nonverbal behavior. Also, mediators can choose to respect individual African Americans as well as their cultural differences.

### VI. PARTICULAR ISSUES INVOLVING CHILDREN THAT AFRICAN AMERICAN COUPLES MAY NEED A MEDIATOR'S ASSISTANCE TO RESOLVE

Dr. Wade Nobles, former president of the Association of Black Psychologists, would agree with President Clinton's statement that African Americans have different world views. In his own words, Dr. Nobles states that African American people are not "carbon copies" of white people.<sup>154</sup> Although there are many similarities between African American culture and white American culture,<sup>155</sup> African Americans acknowledge and follow some atypical cultural traditions that may be the subject of debate during dispute resolution.

One major difference is that African Americans and white Americans have different family values. For example, white families emphasize "independence, achievement, material assets, planning, youth, and

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Brannon, *supra* note 91, at 183. *But see* Grillo, *supra* note 4, at 1579-1581 (delegitimizing African American men and women's anger). The mediator, the "instrument of peace," should be prepared to observe a myriad of emotions during the mediation session and to handle conflicts between the participants. Hobbs, *supra* note 6, at 338 & nn.57-58.

<sup>153</sup> See Dickson, *supra* note 19, at 35; *see also* Grillo, *supra* note 4, at 1572-1573 (discussing divergent views regarding the appropriateness of displaying emotions such as anger during mediation sessions).

<sup>154</sup> Nobles, *supra* note 1.

<sup>155</sup> See Wilson & Stith, *supra* note 13, at 106.

power.”<sup>156</sup> In contrast, African American families place more emphasis on “sharing, obedience to authority, spirituality, and respect for elders and heritage.”<sup>157</sup>

This section takes a closer look at issues affecting children from an African American perspective. Specifically, where their children are concerned, African Americans have strong commitments to the extended family network, child rearing, religion, education and work achievement.<sup>158</sup> These considerations carry great weight because, in some states, when participants are unable to resolve their disputes, mediators may recommend investigations or restraining orders to ensure children’s well-being.<sup>159</sup> Some aspects of African American heritage and culture may influence a mediator’s recommendation or her efforts to assist African American participants in divorce mediation. In order for mediators to make appropriate recommendations to courts about African American families, they need to know more about the people in those families.

#### A. *Extended Family or Kinship Network*

In African American culture, establishing an extended family network is customary. Often, an African American “family” embraces people in addition to consanguineous relatives and members of the nuclear or immediate family. Therefore, “fictive or adoptive kin,” neighbors and co-workers may be considered family.<sup>160</sup>

The boundaries of the African American family may be stretched even further by “informal adoptions.” Informal adoptions take place when relatives or family friends assume the responsibility of caring for a child for an indefinite period. To prevent a child from becoming an orphan, an adult

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See BILLINGSLEY, *supra* note 78, at 330–333; Foley, *supra* note 50, at 243–244 (calling these traits unique); McFadden, *supra* note 13, at 211; Sudarkasa, *supra* note 134, at 31 (adding service to others and self-help and saying that this listing cannot be disputed). *But see* English, *supra* note 92, at 23 (noting that all African Americans do not adhere to these values).

<sup>159</sup> See, e.g., CAL. FAM. CODE § 3183(c) (West 1994); MINN. STAT. ANN. § 518.619(6) (West Supp. 1997).

<sup>160</sup> BILLINGSLEY, *supra* note 78, at 31; BOYD-FRANKLIN, *supra* note 78, at 43; Brannon, *supra* note 90, at 184 (extending the family to include boyfriends, foster parents and other people who are not blood relatives). *But see* BOYD-FRANKLIN, *supra* note 78, at 45 (describing different forms of extended families).



relative or friend takes care of a child whose parents are unable to provide nurturing and care.<sup>161</sup> Although the "adoption" could last anywhere from a few days or weeks to years, no formal adoption proceeding ever occurs.<sup>162</sup>

This kinship or extended family network is extant in today's African American community. The practice remains viable for two reasons. First, in some families, the kinship network constitutes a "mutual aid system."<sup>163</sup> For pecuniary reasons, some African American families pool their resources to pay for food, clothing, furniture, accommodations, transportation, medicine, even food stamps.<sup>164</sup> In addition to the necessity for economic support, families join together to share child care and child rearing responsibilities.<sup>165</sup> In fact, a central reason for creating these "families" is that one or more of the members needs assistance with child care.<sup>166</sup>

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<sup>161</sup> See BOYD-FRANKLIN, *supra* note 78, at 52, 53-54 (finding parents who could not care for their children due to "medical, emotional, financial, housing, or other circumstantial reasons").

<sup>162</sup> See BILLINGSLEY, *supra* note 78, at 29-31 (explaining how informal adoptions develop and giving statistical data); see also JAMES P. COMER & ALVIN POUSSAINT, *RAISING BLACK CHILDREN* 106 (1992); DARLENE P. HOPSON & DEREK S. HOPSON, *DIFFERENT AND WONDERFUL: RAISING BLACK CHILDREN IN A RACE-CONSCIOUS SOCIETY* 89-90 (1990). ("A child might thus be raised entirely by someone other than the biological parents, and want for none of the love and affection necessary to succeed in life.").

<sup>163</sup> Joseph W. Scott & Albert Black, *Deep Structures of African American Family Life: Female and Male Kin Networks*, in *THE BLACK FAMILY: ESSAYS AND STUDIES*, *supra* note 79, at 202; see also HACKER, *supra* note 13, at 78-79.

<sup>164</sup> See HACKER, *supra* note 13, at 78-79; HO, *supra* note 80, at 181; ELMER P. MARTIN & JOANNE MITCHELL MARTIN, *THE BLACK EXTENDED FAMILY* 10 (1978); Robert B. Hill & Lawrence Shackelford, *The Black Extended Family Revisited*, in *THE BLACK FAMILY: ESSAYS AND STUDIES* 201, 201 (Robert Staples ed., 2d ed. 1978); Scott & Black, *supra* note 163, at 202, 203 (living in separate homes). *But see* Sudarkasa, *supra* note 134, at 25-27, 38 (concluding that single mothers are less dependent upon the extended family network and live alone with their dependent children; more single people and elderly African Americans live alone or with a mate, but apart from other relatives).

<sup>165</sup> See Scott & Black, *supra* note 163, at 202.

<sup>166</sup> See *id.* at 203; see also BOYD-FRANKLIN, *supra* note 78, at 43 (calling the exchange system "a very central part of their lives"). Other families need only temporary assistance. Accordingly, they will live with relatives until they are able to establish or regain their own financial independence. See BOYD-FRANKLIN, *supra* note 78, at 45-47; Sr. Mary Jean Flaherty et al., *Grandmother Functions in*

"This tendency [to rely upon the kin and extended family members] is based on the African American belief and tradition that charity begins in the family, and therefore, kin can be *expected* to assist one another willingly and extensively."<sup>167</sup> This familial value system also reflects how African Americans value collectivism more than individualism.<sup>168</sup> "The emphasis on self, the need to assert an 'I,' is one that is more attuned to the Anglo-Saxon white than to the African black, whose emphasis is on 'us,' the need to assert a 'we'. . . . It is not foreign to seek help from 'brothers and sisters' for [African American] families, whereas it is for white ones."<sup>169</sup>

Other African American extended families are formed for another reason. That is, several generations of one family, their relatives and their friends may live in one house, not for financial reasons, but because many African Americans are multigenerational.<sup>170</sup> They do not follow this practice because they are financially unable to maintain their own households or cannot afford to live independently.<sup>171</sup>

Rather, these family members share a dwelling for various noneconomic reasons. For instance, a married couple may invite a grandchild, a parent or a cousin to live with them.<sup>172</sup> A grandmother like Mrs. Walker, a widow, may live with her daughter Urcelle's family because her husband has died or she eventually becomes unable to care for herself. Additionally, because African Americans are multigenerational, a middle-class family that is financially secure may provide housing for a niece to ensure that she attains a better education.<sup>173</sup>

Typically, when an African American couple obtains a divorce, relationships grounded in affinity dissolve, but consanguineal relationships survive the marital breakup. This happens even in situations in which there

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*Multigenerational Families: An Exploratory Study of Black Adolescent Mothers and Their Infants*, in *THE BLACK FAMILY: ESSAYS AND STUDIES*, *supra* note 79, at 195 (studying 19 grandmothers ranging from 29–59 years old).

<sup>167</sup> Scott & Black, *supra* note 163, at 204.

<sup>168</sup> See HO, *supra* note 80, at 180.

<sup>169</sup> Foley, *supra* note 50, at 243.

<sup>170</sup> See HACKER, *supra* note 13, at 72 (arguing that the number of African American multigenerational households is increasing); Sudarkasa, *supra* note 134, at 18 (recreating African extended families and compounds where families had separate homes very close to one another).

<sup>171</sup> See Jones, *supra* note 130, at 5.

<sup>172</sup> See Sudarkasa, *supra* note 134, at 22–23.

<sup>173</sup> See BOYD-FRANKLIN, *supra* note 78, at 218.

has been a hostile dissolution of the marriage.<sup>174</sup> Theorists explain that the focus is on the entire extended family instead of the nuclear family unit; survival of the blood line takes priority over familial discord.<sup>175</sup> Likewise, after their parents' divorce, most African American children maintain contact with the noncustodial parent.<sup>176</sup> Strong kinship ties may explain that closeness.<sup>177</sup>

A second purpose that the extended family system fulfills is to provide leadership. To serve that purpose, a dominant figure in the family supplies security, a sense of family and group identity for that family. When that patriarch or matriarch dies, the extended family perpetuates itself by appointing another leader.<sup>178</sup>

In addition to financial assistance and leadership, extended family members satisfy emotional needs.<sup>179</sup> During stressful times, African Americans depend upon extended family members to provide emotional support.<sup>180</sup> The network can provide powerful assistance for a spouse who is going through divorce proceedings.<sup>181</sup> These extended family members may supply financial support, clean house and perform other duties while the divorced spouse makes the difficult transition from being married to single.<sup>182</sup> Additionally, extended family members "can be a viable temporary resource and shelter for [a] child" of divorcing parents.<sup>183</sup> This support network makes the prospect of divorce "less threatening and less traumatic for the partners involved."<sup>184</sup>

Because the extended family network supports divorcing spouses and their offspring, some of these "family" members may be involved, indirectly, in mediation of custody and visitation issues. As they attempt to move parents toward resolution of their conflicts, mediators may hear about

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<sup>174</sup> See Sudarkasa, *supra* note 134, at 24; Turner, *supra* note 133, at 50.

<sup>175</sup> See Turner, *supra* note 133, at 50.

<sup>176</sup> See HO, *supra* note 80, at 228.

<sup>177</sup> See *id.*

<sup>178</sup> See MARTIN & MARTIN, *supra* note 164, at 10; see also Wilson, *supra* note 78, at 96 (seeking advice from elders and adults).

<sup>179</sup> See BOYD-FRANKLIN, *supra* note 78, at 217-218.

<sup>180</sup> See *id.*

<sup>181</sup> See HO, *supra* note 80, at 223.

<sup>182</sup> See *id.*; see also Wilson, *supra* note 78, at 101 (coping with divorce with the assistance of the network).

<sup>183</sup> HO, *supra* note 80, at 229.

<sup>184</sup> Sudarkasa, *supra* note 134, at 24.

invaluable assistance that extended family members may provide. For example, a parenting plan to provide day care may involve eliciting aid from certain relatives, fictive kin or friends who will assist the custodial parent in rearing children while she works.

Although white Americans may engage in similar networking practices, the African American kinship network is markedly "more cohesive and extensive" than white kinship networks.<sup>185</sup> Typically, white Americans are more dependent upon their small nuclear families.<sup>186</sup> Primarily, the source of familial stability in white families is the marriage bond that forms the core of the nuclear family.<sup>187</sup> Consequently, white families place limits on helping family members outside of the immediate family. Even sisters and brothers "can make only so many demands on one another."<sup>188</sup> In contrast, African American families exercise a stronger interdependence among family members and others who are outside the nuclear family. African Americans take responsibility for all kinds of kin because they believe it is their duty.<sup>189</sup>

### B. Child Rearing and Child Care

*Throughout their marriage, Urcelle and Eugene have been employed outside the home. As a result, since they were three months old, Marcus and Chanika LeShaun have spent most of their days with Mrs. Annie Mae Walker. For years, Urcelle would put the children in the car in their pajamas and drive them two blocks to Mrs. Walker's house.*

*At 6:30 in the morning, Chanika LeShaun and Marcus are still half asleep. As they drag their backpacks across their grandmother's doorsill, they mumble, "Good morning, Momma Annie." Without one more word, they would crawl into the canopied bed in the guestroom at the end of the*

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<sup>185</sup> HO, *supra* note 80, at 180; *see also* BOYD-FRANKLIN, *supra* note 78, at 4 (stating that African American families share the extended family and kinship practices with Hispanic and Chinese families); HACKER, *supra* note 13, at 79.

<sup>186</sup> *See* Brannon, *supra* note 90, at 176; *see also* Wilson, *supra* note 78, at 86 (recognizing distinct differences between African American and white families regarding inclusion of family members other than immediate family members).

<sup>187</sup> *See* Sudarkasa, *supra* note 134, at 24. *See generally* Nobles, *supra* note 74, at 88 (distinguishing African American family life from other cultures).

<sup>188</sup> Sudarkasa, *supra* note 134, at 34.

<sup>189</sup> *See id.* at 34; *see also* Dodson, *supra* note 13, at 82-83 (distinguishing white and African American families' reliance upon kin).

hallway. When Chanika LeShaun was younger, Mrs. Walker would bathe, feed and dress her for school. Whenever Eugene and Urcelle worked late or traveled out of town, which was often, Mrs. Walker cared for the children.

### 1. Multiple Mothering

Acceptable and so-called "normal" standards of child care vary among people of different cultures.<sup>190</sup> Often African American families engage in "multiple mothering." As an outgrowth of the extended family network, many African American grandmothers nurture their grandchildren. On a daily basis, maternal grandmothers like Mrs. Walker offer physical and psychological closeness for the child and relief for the parent. As a consequence, an African American parent may not be solely responsible for her child's affection and care.<sup>191</sup>

In 1981, the primary caretaker theory for determining child custody was announced in *Garska v. McCoy*.<sup>192</sup> In *Garska*, the court determined that it was in a child's best interests to remain in the custody of the parent who was primarily responsible for nurturing that child before divorce proceedings were initiated.<sup>193</sup> To identify a child's primary caretaker, the West Virginia Supreme Court of Appeals recommended that decisionmakers ascertain which parent has been responsible for:

- (1) preparing and planning of meals; (2) bathing, grooming and dressing;
- (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school . . . ; (6) arranging alternative care . . . ; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, . . . ; (9) educating . . . and, (10)

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<sup>190</sup> See Azar & Benjet, *supra* note 86, at 249; Kayvonne Wright, *Sociocultural Factors in Child Abuse*, in *THE AFRO-AMERICAN FAMILY—ASSESSMENT, TREATMENT, AND RESEARCH ISSUES* 238 (Barbara A. Bass et al. eds., 1982).

<sup>191</sup> See Flaherty et al., *supra* note 166, at 193; *see also* Wilson, *supra* note 78, at 87 (rearing babies with the maternal support network); *cf.* Flaherty et al., *supra* note 166, at 196 (finding that grandmothers did not assume the primary parenting role for their grandchildren, but they did provide temporary help for the mothers). *But see* Grillo, *supra* note 4, at 1563-1564, 1567 (opining that mediators tend to dissuade participants from talking about their past conduct so that custody determinations are based upon future-oriented agreements).

<sup>192</sup> 278 S.E.2d 357 (W. Va. 1981).

<sup>193</sup> *See id.* at 362-363.

teaching elementary skills, i.e., reading, writing and arithmetic.<sup>194</sup>

Many state courts rely upon this primary caretaker doctrine as one factor to make custody determinations.<sup>195</sup> Other jurisdictions apply a best interests standard. Based upon that standard, courts consider the totality of circumstances to make custody decisions. Relevant elements include the child's health, safety and well-being.<sup>196</sup>

In light of these custody standards, a proper understanding of the multiple mothering custom is important because a mediator who has the power to recommend an inquiry may request an investigation of a mother who, in the mediator's view, is not properly caring for her child. Under either standard, "multiple mothering" practices may lead a non-African American to erroneously conclude that a parent is unable or lacks interest in rearing her own child.<sup>197</sup> Similarly, a mediator who is unfamiliar with African American extended family practices may doubt whether a particular African American parent has the ability to nurture her child. Questions that may arise include whether the infant has more than one primary caretaker and whether the extended family member usurps the mother's caretaking authority.<sup>198</sup>

On the contrary, the results of one study demonstrated that most mothers who received substantial support from relatives and other members of the community still were engaged in primary caretaking responsibilities. Most of the time, the biological mother fed, bathed, diapered and

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<sup>194</sup> *Id.* at 363.

<sup>195</sup> *See, e.g.,* Burchard v. Garay, 724 P.2d 486, 492-493 (Cal. 1986); Agudo v. Agudo, 411 So. 2d 249, 250 (Fla. Dist. Ct. App. 1982); Rolde v. Rolde, 425 N.E.2d 388, 392-393 (Mass. App. Ct. 1981); Maxfield v. Maxfield, 452 N.W.2d 219, 222 (Minn. 1990); Riaz v. Riaz, 789 S.W.2d 224, 227-228 (Mo. Ct. App. 1990); Pascale v. Pascale, 660 A.2d 485, 492-493 (N.J. 1995); Crum v. Crum, 505 N.Y.S.2d 656, 657 (N.Y. App. Div. 1986); Thompson v. Thompson, 511 N.E.2d 412, 414-415 (Ohio Ct. App. 1987); Jordan v. Jordan, 448 A.2d 1113, 1115 (Pa. Super. Ct. 1982); Pusey v. Pusey, 728 P.2d 117, 120 (Utah 1986); Nickerson v. Nickerson, 605 A.2d 1331, 1332-1333 (Vt. 1992); Patricia Ann S. v. James Daniel S., 435 S.E.2d 6, 9 (W. Va. 1993).

<sup>196</sup> *See, e.g.,* Burgess v. Burgess, 913 P.2d 473, 478 (Cal. 1996) (listing the child's health, safety and amount of contact with parents as factors for consideration); Brooke v. Brooke, 453 N.W.2d 438, 439-440 (Neb. 1990) (discussing particular facts establishing father's right to custody under the best interests of the child standard).

<sup>197</sup> *See* Azar & Benjet, *supra* note 86, at 258.

<sup>198</sup> *See* Flaherty et al., *supra* note 166, at 193-194.

comforted her baby. She helped her baby increase developmental skills. Also, the young mother ensured that her child was immunized, took the child to caregivers for well-baby clinic appointments and sought appropriate medical attention when the child was sick.<sup>199</sup>

## 2. Grandparent Roles and Visitation

Over the years, children like Marcus and Chanika LeShaun grow very close to their grandparents. Many African American grandparents, especially grandmothers, have direct, sometimes primary, contact with their grandchildren. They feed them, bathe them, brush and comb their hair, read to them and send them to school.<sup>200</sup>

Because some African American grandmothers, like Mrs. Walker, provide substantial care for their grandchildren, they may qualify as psychological parents. The psychological parent theory stands for the proposition that people who are not necessarily biological parents may form strong emotional bonds with children.<sup>201</sup> A psychological parent can be a neighbor, a relative or even a babysitter. She could be any person who fulfils a child's psychological and physical needs by providing day-to-day care, love, security and guidance.<sup>202</sup> Frequently, courts recognize that grandparents fit into this category. Thus, they rule that it would be beneficial for children to maintain contact with their grandparents when their parents divorce.<sup>203</sup>

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<sup>199</sup> See *id.* at 194, 196 (indicating that grandmothers viewed themselves only as back-ups).

<sup>200</sup> See *id.* at 197-198; Patricia H. Shino & Linda Quinn, *Epidemiology of Divorce*, FUTURE CHILDREN, Spring 1994, at 15, 20 (living with a grandparent is more prevalent for African American children).

<sup>201</sup> See, e.g., *In re J.W.R. & R.K.R.*, 607 So. 2d 634, 639-641 (La. Ct. App. 1992); *Patzer v. Glaser*, 396 N.W.2d 740, 743 (N.D. 1986).

<sup>202</sup> See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17-20, 28 (1979); see also *Patzer*, 396 N.W.2d at 742-743 (defining psychological parent).

<sup>203</sup> See, e.g., *Patzer*, 396 N.W.2d at 743 (concluding that a child's grandparents, who had cared for him for more than five years, were psychological parents); *Mansukhani v. Pailing*, 318 N.W.2d 748, 753 (N.D. 1982) (declaring that paternal grandparents were psychological parents who were entitled to custody over biological mother, who had not established a bond with the children); see also Kathleen A. Hogan, *Grandparent Visitation in Intact Families*, FAM. ADVOC., Summer 1997, at 8, 8; cf. *Johnson v. Sullivan*, 545 So. 2d 1169, 1171-1174 (La. Ct. App. 1989) (finding

A court may order grandparent visitation when it dissolves a marriage or during child support proceedings. Alternatively, grandparents may seek visitation by filing a separate petition.<sup>204</sup> In some states, statutes authorize a court to order mediation of grandparent visitation disputes.<sup>205</sup> Therefore, mediators may be expected to help parents resolve related issues. Mediators should be sensitive to grandparent needs and the child's best interests as they assist parents in making visitation arrangements.<sup>206</sup>

Presently, due to legislative restraints, grandparents are entitled to court-ordered visitation with their grandchildren only under very limited circumstances. Generally, state statutes permit grandparent visitation in the following circumstances: (1) one or both biological parents are dead or have abandoned the child, (2) the biological parents are divorced or (3) the child is born to a single woman.<sup>207</sup> If any of these situations arises, a court

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that the maternal grandmother was not the sole psychological parent and awarding custody of her grandson to his biological father).

Of course, visitation is appropriate when a grandparent essentially has raised her grandchild. This would be as beneficial for the child as it would be for the grandparent. Abrupt separation of a child from her psychological parent could have permanent and deep psychological effects on the child. *See* BOYD-FRANKLIN, *supra* note 78, at 56 (recognizing psychological bonding).

<sup>204</sup> *See, e.g.*, ALA. CODE § 30-3-4(1) (Supp. 1997) (allowing a grandparent to intervene in the dissolution proceeding or to file a separate petition); GA. CODE ANN. § 19-7-3(b) (Supp. 1997); MINN. STAT. ANN. § 257.022(1)-(2b) (West 1992 & Supp. 1997); N.M. STAT. ANN. § 40-9-2A (Michie 1994); OHIO REV. CODE ANN. § 3109.051(B)(2) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 109.121(1)(c)(A) (1996).

<sup>205</sup> *See, e.g.*, N.M. STAT. ANN. § 40-9-2H (Michie 1994) (permitting mediation and allowing temporary visitation until a final order is issued); N.D. CENT. CODE § 14-09-05.1 (1997) (giving the court authority to order mediation and allowing the mediator to arbitrate the dispute if mediation fails).

<sup>206</sup> *See Carter*, 470 S.E.2d at 203 n.19 (suggesting that mediators may help parents to focus on children's best interests).

<sup>207</sup> *See, e.g.*, ALA. CODE § 30-3-4 (Supp. 1997); ARIZ. REV. STAT. ANN. § 25-409A (West Supp. 1997); ARK. CODE ANN. § 9-13-103(a)(1) (Michie Supp. 1995) (also allowing visitation if the parents are legally separated); COLO. REV. STAT. § 19-1-117(1) (1997); FLA. STAT. ANN. § 752.01(1) (West 1997) (permitting visitation when the marriage is intact too); GA. CODE ANN. § 19-7-3(b) (1997); 750 ILL. COMP. STAT. ANN. 5-607(b)(1) (West 1997); IND. CODE ANN. § 31-175-1(b) (West Supp. 1997) (not allowing visitation to paternal grandparents if paternity has not been established and the child was born when the mother was not married); IOWA CODE ANN. § 598.35 (West 1997); MO. ANN. STAT. § 452.402(1) (West 1997); MONT. CODE ANN. § 40-9-102(1) (1997); NEB. REV. STAT. § 43-1802(1) (1993); N.M.



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may allow reasonable visitation when it is in the best interests of the child.<sup>208</sup> Two factors that some courts consider to determine whether grandparent visitation would be in a child's best interests are the length of time the grandparent spent with the child and the quality of their relationship.<sup>209</sup>

In the African American community, many grandmothers share the responsibility of rearing children. For that reason, in appropriate situations, mediators may be required to assist grandmothers and parents in resolving

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STAT. ANN. § 40-9-2a, B (Michie 1998); N.D. CENT. CODE § 14-09-05.1 (1997); OHIO REV. CODE ANN. § 3109.051(B)(1) (Banks-Baldwin Supp. 1997); W. VA. CODE §§ 48-2B-3 (1996).

<sup>208</sup> See, e.g., ARIZ. REV. STAT. ANN. § 25-409C (West Supp. 1997); ARK. CODE ANN. § 9-13-103(a)(2) (Michie Supp. 1995); COLO. REV. STAT. § 19-1-117(2) (1997); FLA. STAT. ANN. § 752.01(A) (West 1997); GA. CODE ANN. § 19-7-3(B) (Supp. 1997); 750 ILL. COMP. STAT. ANN. 5/607(b)(1) (West 1997); IOWA CODE ANN. § 598.35 (West Supp. 1997); MINN. STAT. ANN. § 257.022(1)-(2b) (West 1993 & Supp. 1997); MO. ANN. STAT. § 452.402(2) (West 1997); MONT. CODE ANN. § 40-9-102(2) (1997); NEB. REV. STAT. § 43-1802(2) (1993); N.M. STAT. ANN. § 40-9-2I (Michie 1994); OHIO REV. CODE ANN. § 3109.051(B)(1)(c) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 109.121(4) (Supp. 1996). Compare *Castagno v. Wholean*, 684 A.2d 1181 (Conn. 1996), with *King v. King*, 828 S.W.2d 630 (Ky. 1992) (considering whether grandparents should be allowed visitation when the family remains intact).

<sup>209</sup> See, e.g., ARIZ. REV. STAT. ANN. § 25-409 (West Supp. 1997) (considering the grandparent's "historical relationship" with the child); FLA. STAT. ANN. § 752.01(2)(b) (West Supp. 1997); IOWA CODE ANN. § 598.35 (West 1997) (requiring a "substantial relationship with the child"); MINN. STAT. ANN. § 257.022(1)-(2b) (West 1993 & Supp. 1997) (allowing visitation when the child has lived with her grandparents for at least one year and considering other personal contact or emotional ties the grandparent has established with the child); NEB. REV. STAT. § 43-1802(2) (1993) (requiring clear and convincing evidence of a "significant beneficial relationship" in the past or the present); N.M. STAT. ANN. § 40-9-C,D (Michie 1994) (allowing visitation when the child has been with the grandparent for at least three months if the child is younger than six years old, and if the child has been with the grandparent for at least six months if the child was six or older when the child was removed from the grandparent's home); OHIO REV. CODE ANN. § 3109.051(D)(1) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 109.121(1)(a)(A) (Supp. 1996) (establishing or attempting to establish an ongoing personal relationship with the grandchild); PA. CONS. STAT. ANN. § 5313 (West Supp. 1997) (granting visitation rights when child has lived with grandparent for at least 12 months); *In re Robert D.*, 151 Cal. App. 3d. 391 (Cal. Ct. App. 1984) (granting visitation privileges to a grandparent with whom child had lived for two years).

visitation issues.<sup>210</sup> To illustrate, when Urcelle and Eugene divorce, Mrs. Walker may seek visitation privileges with Chanika LeShaun and Marcus. The mediator may have to hold a separate mediation session to address this issue.

Mediators may not advise participants regarding visitation laws. However, they may encourage disputants to seek legal advice so that they will reach decisions that are in the child's best interests.<sup>211</sup> Therefore, when parents are reluctant to agree on a grandparent's petition for visitation, the mediator should encourage them to seek legal advice.

### *3. Parental-Child Responsibilities, Discipline and Abuse and Neglect Issues*

*Nowadays, Urcelle, who has moved out of the family residence and has temporary custody, retrieves the children from her mother's home at approximately 6:30 p.m. each workday. Urcelle is mentally and physically fatigued when she and the children arrive home a few minutes later. To help her mother, fourteen year old Chanika LeShaun prepares dinner for the family. Then, methodically and dutifully, Chanika LeShaun feeds Marcus, washes dishes and gets Marcus ready for bed.*

Another cultural distinction that may influence a mediator's recommendation in mediations involving children is the role that older children play in some African American homes. Frequently, in African American families, both parents must work outside the home. While the parents are away from home, older children are expected to assume parental or adult responsibility.<sup>212</sup> The eldest child may be charged with the duties of caring for her younger siblings, running errands and performing household chores. Sometimes, six and seven year-old children take odd jobs—like newspaper delivery—to supplement the family income.<sup>213</sup>

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<sup>210</sup> See Wilson & Stith, *supra* note 13, at 109 (considering the family's problem and including extended family members and significant others).

<sup>211</sup> See Hobbs, *supra* note 6, at 339 (suggesting that the mediator assist the parents in making decisions that benefit all interested parties, including grandparents and children). But see NEUMANN, *supra* note 14, at 10-11 (explaining custody laws); Moberly, *supra* note 6, at 714.

<sup>212</sup> See BOYD-FRANKLIN, *supra* note 78, at 64, 76-77; COMER & POUSSAINT, *supra* note 162, at 9-10; HO, *supra* note 80, at 181-182.

<sup>213</sup> See COMER & POUSSAINT, *supra* note 162, at 9-10; FAIR, *supra* note 98, at 8,

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Divorced mothers, like Urcelle, experience a forty-three percent decrease in income.<sup>214</sup> So, after a divorce, a single parent, usually the mother, may need to seek extra employment so that she can provide necessities of life for her children.<sup>215</sup> Therefore, when Urcelle's divorce is finalized, she may be forced to rely on Chanika LeShaun, the parental-child, even more.

With respect to discipline, some child advocates argue that African American parents are overly strict with their children. Their rigid and stern method of rearing children is attributed to their belief that society is less tolerant when an African American child misbehaves.<sup>216</sup> Furthermore, African American parents believe that their children must outperform non-African American children or they will be branded as incompetent.<sup>217</sup> Accordingly, African American parents rear their children in a manner that will help them to cope and survive in a "society that does not reinforce positive evaluations of their ethnic group."<sup>218</sup> The inference, then, is that African American parents are more strict in order to protect their children.

Some African American parents rely upon religious teachings—whether they follow the Catholic, Protestant or some other religious doctrine does not matter—to discipline their children.<sup>219</sup> Certainly, parents have a right to correct and punish their children as long as their disciplinary methods are not excessive.<sup>220</sup> Nevertheless, one familiar paraphrased biblical passage which African American parents recite is "spare the rod, spoil the child."<sup>221</sup> This adage is oft-quoted to support parents' belief that they are

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20–26 (working at age seven); see also HO, *supra* note 80, at 181–182, 186, 195; HOPSON & HOPSON, *supra* note 162, at 90.

<sup>214</sup> See HO, *supra* note 80, at 224.

<sup>215</sup> See *id.* at 223–224.

<sup>216</sup> See Azar & Benjet, *supra* note 86, at 259; see also Ronald E. Taylor, *Child Rearing in African American Families*, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE, *supra* note 78, at 133–134 (socializing children to prepare them to live in a dominant society).

<sup>217</sup> See BOYD-FRANKLIN, *supra* note 78, at 215 (placing "great pressure on children to achieve"); Azar & Benjet, *supra* note 86, at 259; Nobles, *supra* note 74, at 88 (preparing children to deal with racism).

<sup>218</sup> Brannon, *supra* note 90, at 178.

<sup>219</sup> See HO, *supra* note 80, at 193.

<sup>220</sup> Compare DiMagno v. DiMagno, 452 S.E.2d 404, 407 (W. Va. 1994), with Ronningen v. C.W., 290 N.W.2d 675, 677–678 (N.D. 1980).

<sup>221</sup> HO, *supra* note 80, at 193; see also Proverbs 13:24 (King James) (encouraging parents to spank their children).

obligated to discipline their children in an acceptable manner.

Mediators have a mandatory reporting obligation when they suspect that a child has been neglected or abused.<sup>222</sup> Those who do not understand African American culture regarding strict upbringing and the need for older children to take on adult responsibilities may misconstrue those practices as neglect or abuse. However, reasonable disciplinary measures and reliance upon children for help do not constitute child abuse or neglect.<sup>223</sup> Children who have been abused exhibit "demonstrable external or internal physical injuries. The injuries are inflicted during extreme punishment, discipline, or physical assault. . . ." <sup>224</sup> Neglected children are denied nutrients, such as proper food, and emotional stimulation. Often, neglected children are underweight and apathetic.<sup>225</sup> Obviously, the aforementioned customs, without more, do not constitute neglect or abuse.

### C. The African American Church

*Urcelle and Eugene are Christians. For ten years before they separated, they attended the Divine Heights Baptist Church. After they separated, however, Eugene renounced the Protestant faith and became a Jehovah's Witness. Urcelle doubts the validity of Eugene's newfound religion and refuses to give him permission to take the children to worship with him.*

As an institution, the African American church is an integral part of African American culture.<sup>226</sup> Social scientists categorize these church

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<sup>222</sup> See, e.g., KAN. STAT. ANN. § 38-1522(A) (1993); KY. REV. STAT. ANN. § 620.030 (Michie 1990) (requiring everyone to report neglect and abuse); MICH. COMP. LAWS ANN. § 722.623(1) (West Supp. 1997) (requiring counselors, psychologists, social workers and family therapists to report); OHIO REV. CODE ANN. § 3109.052(c) (Banks-Baldwin 1995); VA. CODE ANN. § 63.1-248.3(A)(10) (Michie 1995); WIS. STAT. ANN. § 48.981(2) (West 1997).

<sup>223</sup> See HO, *supra* note 80, at 193; Azar & Benjet, *supra* note 86, at 249-250 (indicating that people of color are more likely to be suspected of abuse). But see Robert L. Hampton, *Child Abuse in the African American Community*, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE, *supra* note 78, at 220-246 (reporting that child abuse does exist in African American families).

<sup>224</sup> Wright, *supra* note 190, at 239.

<sup>225</sup> See *id.*

<sup>226</sup> See HO, *supra* note 80, at 182; see also HOPSON & HOPSON, *supra* note 162, at 91 (referring to the church as the "focal point of Black family life"); Sudarkasa, *supra*

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families as quasi-family.<sup>227</sup> As such, African American churches fulfill needs of entire families when they supply food, goods, services, activities and housing. By managing nurseries, preschools and Sunday School programs, church members also give parents a reprieve.<sup>228</sup> Moreover, spiritual nourishment from the church helps to strengthen African Americans for coping with societal stresses and racism.<sup>229</sup> Social and religious services “help[] to maintain family solidarity while also allowing for the expression of anger, distress, and pain.”<sup>230</sup>

Traditionally, African Americans have had a strong spiritual commitment to the institution of marriage. Divorce is discouraged.<sup>231</sup> Because ministers at these churches usually are held in high esteem,<sup>232</sup> African American couples like Urcelle and Eugene may seek ministerial counseling before they decide to divorce.<sup>233</sup>

During mediation, one of the participants may even quote biblical passages to support her reasoning. Mediators, however, should avoid

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note 134, at 36 (referring to the church as the “strongest institution” and “one of the anchors of African American communities today”).

<sup>227</sup> See Scott & Black, *supra* note 163, at 208; see also EDWARD WIMBERLY, PASTORAL CARE IN THE BLACK CHURCH 96 (1979) (calling the church “the rich soil for the [African American] family”).

<sup>228</sup> See Scott & Black, *supra* note 163, at 207.

<sup>229</sup> See WIMBERLY, *supra* note 227, at 95–96 (noting that the church acts as a surrogate family for African Americans who were away from their families); see also BILLINGSLEY, *supra* note 78, at 349, 355, 357–358, 359 (delineating kinds of assistance churches give African American families); HO, *supra* note 80, at 182; NATIONAL URBAN LEAGUE, INC., THE STATE OF BLACK AMERICA 222 (1996) (noting that the churches offer child care for working parents) [hereinafter NATIONAL URBAN LEAGUE]; Foley, *supra* note 50, at 243; William Harrison Pipes, *Old-Time Religion: Benches Can't Say Amen*, in BLACK FAMILIES, *supra* note 74, at 41 (providing an “emotional escape”); Scott & Black, *supra* note 163, at 207 (calling churches a “web of life of welfare services for family networks and individuals”); Sudarkasa, *supra* note 134, at 35–36 (noting that churches give hope to the hopeless).

<sup>230</sup> Wilson & Stith, *supra* note 13, at 105 (encouraging therapists to recognize the significance of the church and the individual's spirituality and to incorporate it into the therapeutic process).

<sup>231</sup> See HO, *supra* note 80, at 222.

<sup>232</sup> See BOYD-FRANKLIN, *supra* note 78, at 90; see also Pipes, *supra* note 229, at 74.

<sup>233</sup> See WIMBERLY, *supra* note 227, at 106–108 (suggesting ways for ministers to solve family crises); see also Hobbs, *supra* note 6, at 339 (urging mediators to work with clergymen).

engaging in "unproductive intellectual or philosophical [arguments about religion]." <sup>234</sup> On the other hand, mediators must respect and give proper credence to these beliefs. Otherwise, they may lose the participants' confidence. <sup>235</sup>

In addition to their own personal issues, African American parents' dedication to religion may affect their agreement regarding a child's religious upbringing. Generally, the parent who has legal custody of a child has sole authority to make decisions regarding the child's religious training. <sup>236</sup> Neither the court nor the mediator has the power to infringe upon that authority. They may not interfere even when the child's parents cannot agree. <sup>237</sup>

Because religion is an important part of African American family life, African American parents like Eugene and Urcelle may want to negotiate a settlement regarding whether their children will be exposed to certain religious teachings. If some exposure is allowed, the Browns may want to discuss limitations on that exposure. Also, if Urcelle gets permanent custody of Chanika LeShaun and Marcus, she may seek an agreement that Eugene take the children to Baptist services when they visit him. Another possibility is that the children may be allowed to attend their father's church and to discuss his religion. Eugene may be forbidden, however, to coax the children to follow Jehovah's Witness doctrines. <sup>238</sup> As they strive to assist African American parents to resolve custody and visitation issues,

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<sup>234</sup> HO, *supra* note 80, at 222 (considering "divorce as following in the devil's trap").

<sup>235</sup> See BOYD-FRANKLIN, *supra* note 78, at 89-90.

<sup>236</sup> See *In re Marriage of Tiskos*, 514 N.E.2d 523, 527-529 (Ill. App. Ct. 1987) (interpreting Illinois statute); *S.E.L. v. J.W.W.*, 541 N.Y.S.2d 675, 676-677 (N.Y. Fam. Ct. 1989); *In re Lange v. Lange*, 502 N.W.2d 143, 146 (Wis. Ct. App. 1993); see also 750 ILL. REV. STAT. 40/608(a) (1997) (authorizing the custodial parent to choose the child's religious upbringing).

If the child is old enough, however, she will choose her own religion. See, e.g., 750 ILL. REV. STAT. 40/608(a) (1997); *S.E.L.*, 541 N.Y.S.2d at 678; *Siegel v. Siegel*, 472 N.Y.S.2d 272, 273 (N.Y. Sup. Ct. 1984); MOSTEN, *supra* note 12, at 38-39 (allowing children to meet with the mediator and to participate in the sessions).

<sup>237</sup> See *Siegel*, 472 N.Y.S.2d at 273; cf. *LeDoux v. LeDoux*, 452 N.W.2d 1, 5 (Neb. 1990).

<sup>238</sup> See *LeDoux*, 452 N.W.2d at 5-6 (allowing father to discuss his religious beliefs with children as they are consistent with the teachings of the mother's church); *S.E.L.*, 541 N.Y.S.2d at 679 (allowing the child to attend Sunday services with her father and giving him permission to answer "casual questions" only).

mediators should be sensitive to the disputants' religious concerns and be prepared to draft an agreement that reflects their religious preferences and values.<sup>239</sup>

#### D. Education

African American families place a high premium on education. Usually, parents are willing to make huge sacrifices for a child to attend school. In some families, older siblings may even forego opportunities to be educated themselves and work to pay for a younger child's education.<sup>240</sup> These selfless sacrifices are made because most African Americans believe that "the essential path to success in life is through higher education, work security, and social mobility."<sup>241</sup> For these reasons, African American parents like the Browns may be more adamant about ensuring that their children will be educated. Discussions may involve issues such as where Marcus and Chanika LeShaun will attend school and whether the noncustodial parent will provide financial support for a college education.<sup>242</sup>

Currently, the majority view is that whether a divorced parent will be obligated to finance an adult child's postsecondary education should be decided on a case-by-case basis.<sup>243</sup> The decision is based upon three factors: the child's aptitude, her desire to receive additional education and the parent's ability to pay educational costs.<sup>244</sup> One of the more prominent

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<sup>239</sup> See Wilson & Stith, *supra* note 13, at 105, 109 (suggesting that family therapists develop this sensitivity).

<sup>240</sup> See HO, *supra* note 80, at 181; see also Sudarkasa, *supra* note 134, at 35 (calling it a sacrifice when a sibling works to help pay for another sibling's education).

<sup>241</sup> HO, *supra* note 80, at 181; see also BILLINGSLEY, *supra* note 78, at 181-183, 329.

<sup>242</sup> See NEUMANN, *supra* note 14, at 12.

<sup>243</sup> See *Poulson v. Poulson*, 612 N.E.2d 193, 194-195 (Ind. Ct. App. 1993) (authorizing the court to order non-custodial parents to pay a share of the educational costs); *Nash v. Mülle*, 846 S.W.2d 803, 806 (Tenn. 1993) (ordering the noncustodial parent to establish an educational trust fund for a child with whom he had no relationship); cf. *In re Marriage of Alexander*, 596 N.E.2d 1335, 1337 (Ill. App. Ct. 1992) (requiring a noncustodial parent to pay a portion of the costs to send his son to a parochial high school because the child support statute included the child's educational needs as a factor).

<sup>244</sup> See *Wilson v. Hermanson*, 655 So. 2d 1071, 1073 (Ala. Civ. App. 1995); *Zakarin v. Zakarin*, 565 So. 2d 790, 791-792 (Fla. Dist. Ct. App. 1990) (not requiring

rationales for ordering a divorced parent to pay postsecondary education costs, or even high school expenses, is that the child is entitled to the standard of living she would have enjoyed if the marriage had survived. Furthermore, state public policy favors college education.<sup>245</sup>

In this sense, mediation may yield better results for African American children. Parents do not have to rely upon a court to determine whether the noncustodial parent has an obligation to finance a child's education. In mediation, a noncustodial parent can agree to provide pecuniary support. If he does, and the agreement is incorporated into the divorce decree, the court will enforce that contract.<sup>246</sup> Thus, a mediator may expect to facilitate discussions between parents like Eugene and Urcelle as they endeavor to negotiate an agreement regarding Marcus and Chanika LeShaun's educational future.

### *E. Work Ethic That May Affect Child Support*

*Both Eugene and Urcelle are employed. Eugene is an electrical engineer. Urcelle is a licensed practical nurse. However, many African Americans are unemployed.*

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parent to provide education); *Neudecker v. Neudecker*, 577 N.E.2d 960, 961-962 (Ind. 1991) (citing and quoting relevant Indiana statutes and finding that college expenses "are not unlike . . . other optional undertakings within the discretion of married parents but [are] subject to compulsory payment by inclusion in a child support order in the event of dissolution"); *Sakovits v. Sakovits*, 429 A.2d 1091, 1094-1096 (N.J. Super. Ct. Ch. Div. 1981) (denying education expenses for a child who had been a high school graduate for four years without showing an interest in attending college).

<sup>245</sup> See, e.g., *Poulson*, 612 N.E.2d at 194-195 (citing statutory language); *Nash*, 846 S.W.2d at 808-809 (citing cases in other jurisdictions).

Usually, however, parents in intact families have no obligation to provide financial support for educational expenses of a child who has reached the age of majority. See, e.g., *Neudecker*, 577 N.E.2d, at 961; *Poulson*, 612 N.E.2d at 194. Another exception is that the court may award money for post-minority education if the application is made before the child reaches the age of majority. See, e.g., IND. CODE ANN. § 31-16-6-2(a)(1) (West Supp. 1997) (permitting the court to order the noncustodial parent to pay for education "at institutions of higher learning"); *Ex parte Bayliss*, 550 So.2d 986, 992-994 (Ala. 1989); *Reeves v. Reeves*, 584 N.E.2d 589, 592-593 (Ind. Ct. App. 1992) (considering petition for modifying father's support order); *Newburgh v. Arrigo*, 443 A.2d 1031, 1038-1039 (N.J. 1982).

<sup>246</sup> See, e.g., *Andrews v. Andrews*, 437 So. 2d 1306, 1307-1308 (Ala. Civ. App. 1983); *Smith v. Smith*, 553 N.Y.S.2d 243, 244 (N.Y. App. Div. 1990) (enforcing custodial parent's agreement to pay for child's education).



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For more than three decades, the unemployment rate for African Americans has been twice as high as the rate of unemployment for white Americans.<sup>247</sup> As indicated by a 1996 study, the existence of at least one unemployed person in African American families was more probable than in white families. That year, 25.3% of African American families had no employed members. The remarkably lower percentage for both white and Hispanic families was approximately 18.1%.<sup>248</sup> The following table, which encompasses data collected from a total of 68,000 families, illustrates the current predicament in the African American community as compared with unemployment in white communities.

### UNEMPLOYMENT STATISTICS<sup>249</sup>

	<i>African American Families</i>	<i>White Families</i>
Total families in survey	8,015	57,650
With employed members	5,991	47,216
Percentage of total families	74.7	81.9
With no employed member	2,024	10,433
Percentage of total families	25.3	18.1
With unemployed members	1,080	4,002
Percentage of total families	13.5	6.9

White families were far less likely to have an unemployed member in the household.<sup>250</sup>

As previously stated, women usually get custody of their children after a divorce.<sup>251</sup> Therefore, African American males will have child support

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<sup>247</sup> See NATIONAL URBAN LEAGUE, *supra* note 229, at 29.

<sup>248</sup> See Bureau of Labor Statistics, U.S. Dep't. of Labor, *Employment and Unemployment in Families, Race and Hispanic Origin, 1995-96 Annual Averages*, table 1 (last modified June 13, 1997) <<http://stats.bls.gov/news.release/famee.toc.htm>> .

<sup>249</sup> See *id.*

<sup>250</sup> See *id.*

<sup>251</sup> See HACKER, *supra* note 13, at 87.

obligations. Unfortunately, the unemployment rate for African American males is abysmal. For five decades, the rate of unemployed African American males has doubled the percentage of unemployed white males.<sup>252</sup> Based on a July 1997 survey, the next table compares the number of unemployed African American males over twenty years old with the number of unemployed white males of the same age.

**COMPARATIVE UNEMPLOYMENT STATISTICS FOR MALES<sup>253</sup>**  
*(Twenty years old and older)*

	<i>African American Males</i>	<i>White Males</i>
Total males in civilian labor force	6,945	59,253
Employed men	6,374	57,162
Employment-population ratio	66.0	74.6
Unemployed men	687	2,091
Unemployment-population ratio	8.2	3.5

As the table indicates, the unemployment rate for African American men in December 1997 was 8.2%. At the same time, the rate of unemployment was much lower, 3.5%, for white males. In early 1995, 10.8% of African American males were unemployed compared with only

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<sup>252</sup> See Sudarkasa, *supra* note 134, at 31 (noting that this number is much higher because many African American males do not fit the definition by which the statistics are reported because they may have skipped one month of looking for work or they may not have been classified as in the labor force); see also Bureau of Labor Statistics, *supra* note 248, at ¶ 9 (defining unemployed persons as those who do not have a job, have actively sought work in the preceding four weeks and were available for work when the survey was taken).

<sup>253</sup> See Bureau of Labor Statistics, *Employment status of the civilian population by race, sex, age, and hispanic origin*, at table A-2 (visited Feb. 22, 1998) <<http://stats.bls.gov:80/news.release/epsit.to2.htm>>.

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5.2% of white males.<sup>254</sup> Although these statistics show a slight decrease in unemployment for both African Americans and white Americans, the number of jobless African Americans still far exceeds the number of unemployed white Americans.

These figures show that African American men consistently have remained unemployed at an extremely high rate.<sup>255</sup> This is mostly due to employment discrimination and negative, inaccurate stereotypes. Uncomplimentary descriptions like incompetent, lecherous, lazy, aggressive and slovenly are attributed to African American people in general, but especially African American males.<sup>256</sup>

Unemployment should not be misconstrued as a lack of work incentive but as a result of the victim system—a product of racism, poverty and oppression.<sup>257</sup> Many of these unemployed men have college degrees and want to work but are denied job opportunities.<sup>258</sup> To illustrate, when white American and African American testers sought employment at the same agencies and offices, African Americans were not interviewed and employers misrepresented information about the availability of jobs. The same people, who stated that jobs were unavailable for African American testers, coached white testers in interviewing etiquette and hired them.<sup>259</sup>

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<sup>254</sup> See NATIONAL URBAN LEAGUE, *supra* note 229, at 31 (indicating that the ratio between employed and unemployed African Americans and white Americans is less, but still higher for African American women). In 1984, the jobless rate for African American men was 13% compared with a rate of 9% for all other men. See Glick, *supra* note 80, at 132.

<sup>255</sup> *Summer Looking Hot for Employment Rate*, DOMINION POST, Aug. 3, 1997, at 6D (reporting that although unemployment for African Americans is at the lowest that it has been in 19 years, it still is twice the percentage of white unemployment).

<sup>256</sup> See Delgado et al., *supra* note 6, at 1377; see also BOYD-FRANKLIN, *supra* note 78, at 65; FAIR, *supra* note 98, at 6, 13–14 (attributing unemployment to discrimination, race and gender stereotypes and lack of education rather than laziness); CORNEL WEST, RACE MATTERS 77–83 (1994) (discussing economic effects of discrimination); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 333 (1987) (listing racist stereotypical beliefs about African Americans and Jews); Evan Ramstad & Louise Lee, *Circuit City Suit Shows Problems in Proving Bias*, WALL ST. J., Nov. 18, 1996, at B1 (accusing corporate officers of saying that African Americans cannot perform at the corporate level).

<sup>257</sup> See HO, *supra* note 80, at 181, 183–184 (indicating that although 60% of poor African Americans work, only 50% of poor white Americans work).

<sup>258</sup> See FAIR, *supra* note 98, at 169.

<sup>259</sup> See *id.* at 161.

Other white employers will not hire African American males because either the employers or their employees fear and distrust African American males.<sup>260</sup>

"To be [African American] in America is to know that you remain last in line for so basic a requisite as the means for supporting yourself and your family."<sup>261</sup> Employment discrimination has a trickle-down effect that reaches African American children. When African American families dissolve, unemployed fathers are not likely to receive custody of their children. Some of these unemployed fathers are unable, not unwilling, to make financial contributions to provide necessities for their children.<sup>262</sup>

Similarly, African American women find it difficult to obtain employment, and it affects their ability to care for their children. The number of unemployed white women and African American women was larger than the gap between African American men and white men. In January 1997, the unemployment rate for African American women was 9.4%. For white women, the unemployment rate was 4.2%.<sup>263</sup>

With respect to African American women who do not work, there is a stereotypical belief that they choose to be welfare recipients because they are otiose and unwilling to work. On the contrary, some mothers who are on welfare are in a catch-22 situation. Many of them want to work, but they are unable to earn enough money to pay for health care, child care and other expenses that they incur when they work.<sup>264</sup> In most cases, public

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<sup>260</sup> See BOYD-FRANKLIN, *supra* note 78, at 65 (listing indicia of the fear); see also FAIR, *supra* note 98, at 161-162 (blaming fear as an impediment to advancement for people of color); *Fear of Blacks, Fear of Crime*, N.Y. TIMES, Dec. 28, 1986, at D10 (noting whites fear mugging and robberies); Jane Lazarre, *Raising Black Sons: A White Mother's Meditation*, COMMONQUEST, Summer 1997, at 36, 37, 39 (stopping young African American males and requesting identification on college campuses).

<sup>261</sup> HACKER, *supra* note 13, at 104.

<sup>262</sup> See BOYD-FRANKLIN, *supra* note 78, at 68; see also HACKER, *supra* note 13, at 87-88 (noting that fathers try to avoid child support payments). But see Grillo, *supra* note 4, at 1569-1572 (noting equalized entitlement to custody regardless of a parent's previous lack of support).

<sup>263</sup> Bureau of Labor Statistics, *supra* note 253, table A-2.

<sup>264</sup> See HACKER, *supra* note 13, at 86, 89 (concluding that no one can live well on welfare and that child care alone could amount to \$1000 a month—almost as much as the working mother earns); Sudarkasa, *supra* note 134, at 31. There is a common misconception that African Americans are the only ones on welfare. See BILLINGSLEY, *supra* note 78, at 69-70 (quoting Patricia Raybon, *A Case of 'Severe Bias,'* NEWSWEEK, Oct. 2, 1989, at 11); see also HACKER, *supra* note 13, at 73 (noting that

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assistance pays more than the minimum wage that many of these mothers would earn. Furthermore, if their annual income exceeds \$10,000, Medicaid benefits may be terminated. Many welfare recipients work anyway to supplement the meager welfare stipends they receive.<sup>265</sup> Recent changes in the welfare system, including child care and health care provisions, may make it feasible for more mothers to work outside the home and to afford quality child care.<sup>266</sup>

The effect that these statistics have on mediation is that parties are forced to be more creative in choosing alternatives to resolve their custody and child support issues. Despite dismal employment data, an African American father may make meaningful contributions, other than pecuniary benefits, to enrich his child's life. For example, although the father does not have any income himself, his family, the child's paternal relatives, may be willing to provide assistance on his behalf.<sup>267</sup> Also, parents should focus on forging blood ties between the child and her paternal relatives—a vital connection for the child's development.<sup>268</sup>

### VII. OTHER SOLUTIONS FOR MORE EFFECTIVE AND PRODUCTIVE MEDIATION SESSIONS

In a 1985 publication, Professor Richard Delgado suggested ways of diminishing the probability that prejudice would emerge during mediation sessions. To curtail irrelevant or intrusive inquiries, for example, he proposed that some kind of review system should be implemented to

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about 50% of single African American mothers are self-supporting); *cf.* HACKER, *supra* note 13, at 86 (stating that figures support the view that more African Americans and Hispanics are welfare recipients).

<sup>265</sup> See HACKER, *supra* note 13, at 73.

<sup>266</sup> See Sudarkasa, *supra* note 134, at 31; *see also* HACKER, *supra* note 13, at 89 (recognizing the difficulties of finding suitable child care). *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. §§ 1305 *et seq.*).

<sup>267</sup> See BOYD-FRANKLIN, *supra* note 78, at 67-68. Of course, if the court decides the amount of child support, it would be based upon the father's actual earnings or his earning capacity. *See, e.g., In re Hinman*, 64 Cal. Rptr. 2d 383, 389 (Cal. Ct. App. 1997); *Burdette v. Burdette*, 681 So. 2d 862, 863 (Fla. Dist. Ct. App. 1996); *Gray v. Gray*, 604 N.Y.S.2d 987, 988 (N.Y. App. Div. 1993); *Canning v. Juskalian*, 597 N.E.2d 1074, 1077 (Mass. App. Ct. 1992).

<sup>268</sup> See BOYD-FRANKLIN, *supra* note 78, at 68.

provide redress for participants who may have been subjected to bias.<sup>269</sup> Moreover, Professor Delgado advocated for appointment of mediators who were professionals. In Professor Delgado's view, each party who wanted an experienced advocate, preferably an attorney, should have one. Finally, Professor Delgado beseeched mediation organizers to give parties the freedom to reject an unacceptable mediator.<sup>270</sup>

To some degree, these criteria would protect African American participants from mediators who are biased and prejudiced. They would enable participants to seek relief if they were assigned to or chose a mediator who was prejudiced or insensitive to cultural differences.

Mediators who work with "persons whose needs and values are unfamiliar to [them] and possibly in conflict with [theirs], [should] develop the ability to recognize and understand these needs and values . . . [and] learn to respond to these needs and values in ways that enhance the quality of the mediation process rather than diminish it."<sup>271</sup> There are a few ways to introduce mediators to cultural sensitivity. For example, formal instruction on African American family culture and values, the extended family network and informal adoptions should be provided. African American psychologists, social workers and family therapists could be invited to present seminars on those subjects.<sup>272</sup>

Explorations of the broader issues of ethnicity and race [] and social class could [] significantly enhance one's comprehension of the multiple forces affecting a willingness to change. Moreover, demonstrations of how one's use of language can foster greater trust and influence the choice of remedies might instill in trainees a greater understanding of the underlying principles of conflict resolution.<sup>273</sup>

Establishing a diverse pool of mediators is another solution. African American mediators could help educate their white counterparts.

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<sup>269</sup> See Delgado et al., *supra* note 6, at 1403.

<sup>270</sup> See *id.*

<sup>271</sup> Jackson, *supra* note 52, at 73.

<sup>272</sup> See BOYD-FRANKLIN, *supra* note 78, at 242-243 (suggesting that social scientists share their knowledge and experience and promote diversity among family therapists); see also Wong, *supra* note 17, at 122-123 (suggesting training about specific cultural differences among clients).

<sup>273</sup> Wong, *supra* note 17, at 122 (quoting Beatrice Schultz, *Conflict Resolution Training Programs: Implications for Theory and Research*, 5 NEGOTIATION J. 301, 309 (1989)).

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Additionally, when participants in private mediation would be more comfortable with an African American mediator, they would have an opportunity to choose one. Alternatively, team mediation of a white mediator with someone who is culturally aware of African American customs may be advisable. "This cultural specialist would be responsible for adequately [] presenting the parties' cultural needs and desires. The cultural specialist becomes an important check for the other mediator, minimizing potential bias [] against the clients."<sup>274</sup> Further still, the mediator could add another component to her initial session with the couple. She could "observe[] the degree of acculturation and eliminate[] [any] negative perceptions before the process begins" and structure the mediation accordingly.<sup>275</sup>

There are not enough empirical studies of the mediation process to ascertain whether certain groups of people are being treated unfairly. If such information is ever revealed, though, the situation should be eliminated. If the problem cannot be rectified, judges and lawyers should re-evaluate their decisions to refer certain disputants to mediation.<sup>276</sup>

## VIII. CONCLUSION

There are no perfect or generic pictures of African Americans. Hence, this article serves only as a background. It is not intended to paint a picture of all African American families (or white families). Still, requisite numbers of African Americans adhere to certain practices discussed in this article.

Although African Americans and white Americans share some cultural similarities, African American families and white American families are not alike in all respects. African Americans have different views of the world, different family values, different ways of responding to the dispute resolution process and different ways of rearing children. "American values of individualism, independence, autonomy, ownership of material goods, achievement, mastery, efficiency, and future planning are in direct opposition to [African] American cultural values that stress collectivity, sharing [] affiliation, deference to authority, spiritualism, and respect for

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<sup>274</sup> Wong, *supra* note 17, at 124.

<sup>275</sup> *Id.* at 123.

<sup>276</sup> See King, *supra* note 51, at 97; Wong, *supra* note 17, at 126 (calling for research on cross-cultural mediations).

the elderly.”<sup>277</sup>

Variances between African American litigants’ culture, background and priorities and those of white mediators may affect African Americans’ participation in mediation sessions. Racism, biases and stereotypes may influence the mediator’s verbal and nonverbal reactions during mediation. In response, African American participants may not participate as zealously as they should participate. More important, the process could be irrevocably tainted.

This writer does not advocate development and implementation of separate dispute resolution processes for African Americans. However, mediators should be trained to recognize and accept African American cultural differences and to take those variations into account as they assist participants to resolve family disputes. Mediators who are responsible for assisting people to resolve family issues should prepare to deal with people of diverse cultures. Namely, they should seek and receive specialized training so that they will be prepared to address these people’s needs. With respect to family mediation, useful skills would include cultural sensitivity training in interpersonal communication, “greeting patterns; etiquette around formal relationships; and cultural attitudes about time, authority and privacy.”<sup>278</sup>

In general, cultural sensitivity training may be wise because a few scholars have predicted that by the next century, the number of people of color is going to increase markedly in the United States.<sup>279</sup> As society becomes more multicultural and the courts’ caseloads increase to unmanageable levels, more people of color are going to be referred to mediation to resolve their claims.<sup>280</sup>

If mediators expect to assist participants to resolve their conflicts, they must leave their own culture at the door. Then they should listen and be alert for matters that may be influenced by the participants’ culture. Given the right encouragement, African American family members will discuss those issues that are important to them. During dissolution proceedings, the mediators’ role is to help them to reach a resolution that serves as many of those needs and interests as possible.

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<sup>277</sup> HO, *supra* note 80, at 188.

<sup>278</sup> See Jones, *supra* note 130, at 5.

<sup>279</sup> See Donald R. Atkinson, *Defining Populations and Terms*, in COUNSELING AMERICAN MINORITIES: A CROSS-CULTURAL PERSPECTIVE, *supra* note 13, at 3; Wong, *supra* note 17, at 110 (predicting that the numbers will increase).

<sup>280</sup> See Wong, *supra* note 17, at 110.